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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

[SUPREME COURT] OF OHIO.

REPORTED BY

EMILIUS O. RANDALL,

SUPREME COURT REPORTER.

NEW SERIES.

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For the time commencing February 9, 1901, and ending
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- Act of March 12, 1845. Establishment of free turnpikes. *Miller v. Hixson*, Treas., 53.
- Act of March 27, 1857. County commissioners paying for free turnpike roads. *Miller v. Hixson*, Treas., 54.
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- Act of April 14, 1900. Civil service commission for Columbus. *State v. Hoglan*, 543.
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- Sec. 1, Art. 12, Const. The general assembly shall pass no special act conferring corporate powers. *State ex rel. v. Cowles et al.*, 162.
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- Sec. 28, Art. 2, Const. Legislative retroactive laws. *State ex rel Medical College v. Coleman et al.*, 386.
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- Section 3461, Revised Statutes. Magnetic telegraph companies. How right to use public ground acquired. *Zanesville v. Telegraph and Telephone Company*, 67.
- Section 3454, Revised Statutes. Magnetic telegraph companies. Powers of companies. *Zanesville v. Telegraph and Telephone Co.*, 67.
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- Section 3629, Revised Statutes. Life insurance companies. May insure life of husband. *Stickon v. Schmidt*, 359.
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- Section 4364-12, Revised Statutes. Intoxicating liquors. Collection of taxes in non-payment. *Markle v. Newton*, Treas., 498.
- Sections 4364-13 and 4364-14, Revised Statutes. Intoxicating liquors. Assessor's returns; penalties. Auditor's duplicate. *Markle v. Newton*, Treas., 499.
- Section 4403c, Revised Statutes. Requirements for practice of medicine, surgery, or midwifery. *State ex rel. Medical College v. Coleman et al.*, 386.
- Section 4510-3, Revised Statutes. County ditches. Proceedings on failure to agree to pay. *Commissioners v. Commissioners*, 160.
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- Section 5845, Revised Statutes. Sureties may by action compel principal to pay debt. *Henderson-Achert Litho. Co. v. John Shillito Co.*, 250.
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- Section 5971, Revised Statutes. Devise not to lapse by death of devisee for legatee. *Theobald et al. v. Fugman et al.*, 482.
- Section 6040, Revised Statutes. Executors and administrators. Allowance to widow for children. *In re Estate of Hinton*, 490.
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OHIO

JANUARY TERM, 1901.

HON. JOHN A. SHAUCK, CHIEF JUSTICE.	
HON. THAD. A. MINSHALL,	}
HON. MARSHALL J. WILLIAMS,	
HON. JACOB F. BURKET,	
HON. WILLIAM T. SPEAR,	
HON. WILLIAM Z. DAVIS.	
	JUDGES

RUSSELL ET AL. v. BRUER ET AL.

*Course of descent of real property controlled by legal title—
Trust engrafted on absolute deed may be shown by parol
evidence, when.*

1. The course of descent of real property is controlled by the legal title.
2. A trust engrafted on an absolute deed may be shown by parol evidence; but the declaration of such trust must be contemporaneous with the deed, and the evidence beyond a reasonable doubt as to the existence of the trust, and must be clear, certain, and conclusive as to its terms and conditions.

(Decided January 22, 1901.)

ERROR to the Circuit Court of Clark county.

The facts are stated in the opinion.

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Chase Stewart with whom was *George A. Beard*, for plaintiffs in error.

George Arthur, with whom were *Cunningham & Boggs*; and *Cochran, Rogers & Cochran*, for defendants in error.

DAVIS, J. The plaintiffs in error, who are the brothers and sisters and the legal representatives of deceased brothers and sisters of William D. Johnson, deceased, filed a petition in the court of common pleas, for partition of twelve parcels of land belonging to Hannah M. Johnson, deceased, the widow of William D. Johnson, and alleged "that on or about the third day of June, 1875, William D. Johnson died without issue and intestate as to all the real estate in this petition described, of which he died seized, and left surviving him, his wife, Hannah M. Johnson, who as his relict and heir at law acquired title to a part of the real estate hereinbefore described, and to a large amount of personal property. Plaintiffs further say that on or about the twenty-fifth day of May, A. D., 1897, said Hannah M. Johnson, relict of said William D. Johnson, died intestate and without issue, possessed of the real estate acquired by her as relict of the said William D. Johnson, said real estate of which said William D. Johnson died seized consisting of the first three tracts as described and designated herein, and also possessed of the real estate which she purchased and paid for out of the personal property which came to her as the relict of the said William D. Johnson, and being the balance of the real estate described, to-wit, the last nine tracts as designated herein.

"There are no children, or their legal representatives living, of the said William D. Johnson and Hannah M. Johnson, they, the said William D. Johnson

and Hannah M. Johnson, having both died intestate and without issue as aforesaid."

To this petition for partition the defendants in error, who are the heirs at law of Hannah M. Johnson, filed an answer and cross-petition, from which it appears that three of these tracts of land came to Hannah M. Johnson by descent, from William D. Johnson, under section 4159, Revised Statutes of Ohio, and under and by virtue of section 4162 of the Revised Statutes of Ohio, descended one-half to the heirs of Hannah M. Johnson and one-half to the heirs of William D. Johnson, from whom said real estate came; and it is alleged that the other nine tracts of land described in the petition came to Hannah M. Johnson, and she acquired title thereto by purchase, and not by descent, devise, or deed of gift. The defendants, therefore, claim the whole of the said nine tracts. Several answers to this cross-petition were filed in which it was alleged that Hannah M. Johnson had inherited from William D. Johnson more than \$125,000; that she had repeatedly expressed the desire that in the event of the distribution of said property, in whatever form it was invested, the same should be divided one-half among the brothers and sisters or the legal representatives, of William D. Johnson, and one-half among the brothers and sisters or their legal representatives, of Hannah M. Johnson; that whatever interest said Hannah M. Johnson had in said nine tracts of land in dispute, was treated by her as consisting as a part of the fund which had descended to her from William D. Johnson which, whenever distributed, was to be divided in the manner aforesaid; that during her widowhood Hannah M. Johnson made a partial distribution of the property which so descended to her, according to

her said plan and desire; that several of the said nine tracts were not purchased for investment, but that the said Hannah M. Johnson, to save loss in foreclosure proceedings, had accepted deeds from the sheriff, and that the said real estate, when so taken for debts, was still held, considered and treated by her as part of the fund which descended to her from her husband, and upon distribution to be divided as aforesaid; and that after the death of said William D. Johnson, the said Hannah M. Johnson received legal advice which she believed, and upon which she relied that all of the property descending to her, if held, treated and invested by her as aforesaid, would in the event of her dying intestate, under the law of Ohio, be divided in the manner she desired, viz: one-half to the brothers and sisters, or their legal representatives, of William D. Johnson, deceased, and one-half to the brothers and sisters, or their legal representatives, of Hannah M. Johnson, deceased.

The final judgment of the court of common pleas was that the defendants in error, as the legal representatives of the deceased brothers and sisters of Hannah M. Johnson, took all of the said nine tracts of land by descent, at her death, under the third clause of section 4159 of the Revised Statutes. The circuit court having affirmed that judgment of the court of common pleas, the plaintiffs in error now seek to reverse the judgments of the court of common pleas and the circuit court.

It is so well settled in this state that the descent of real property is controlled by the legal title, that it would not be profitable to continue the discussion here. *Brower v. Hunt*, 18 Ohio St., 311; *Stembel v. Martin*, 50 Ohio St., 495; *Higgins v. Higgins*, 57 Ohio St., 239; *Ellis v. Ellis*, 3 C. C. Rep., 186. Hannah M.

Johnson acquired the nine tracts of land now in controversy by purchase and not by descent, devise or deed of gift. The land was not property "which came to such intestate from any former deceased husband," Revised Statutes, Sec. 4162; but it was purchased by the intestate with money which was hers to consume, squander, invest, give away or bequeath, as she might choose. The personal property which she acquired from her deceased husband's estate became hers in absolute right. None of the parties to this action could have any claim to it except by some act of hers, or upon her death. If she chose to convert it into real estate, none could gainsay her. The deeds which she obtained were not deeds of gift from William D. Johnson, but were deeds of purchase from the several grantors; and they are conclusively such. - *Patterson v. Lamson*, 45 Ohio St., 77.

If Mrs. Johnson engrafted upon her absolute estate an express trust in favor of the collateral heirs of herself and her deceased husband, as the law stands in this state, that might be shown by parol evidence; but the evidence must be beyond reasonable doubt as to the existence of the trust, and must be clear, certain and conclusive as to its terms and conditions. *Miller v. Stokely*, 5 Ohio St., 194; *Stall v. Cincinnati*, 16 Ohio St., 169. Nevertheless the declaration of the trust must be contemporaneous with the deed. As was said by Dickman, J.: "It is proper that the parol declarations whereby it is created should be contemporaneous with the conveyance upon which the trust is to be engrafted. If subsequent and not contemporaneous, the door might be open to constant frauds upon the right of property. When the conveyance is absolute on its face, it would be unsafe and contrary to the rules of evidence, to permit a third per-

son,—a stranger to the instrument—to use the parol admissions or declarations of the grantor, made long after the conveyance, for the purpose of divesting the grantee of his rights by fastening a trust or incumbrance on the estate." *Harvey v. Gardner*, 41 Ohio St., 647, 648.

These settled principles of the law enable us to say with a degree of positive assurance that not only was Hannah M. Johnson the owner of the land in controversy, by purchase, but also that she did not engraft upon her title a trust that the land should descend at her death, one-half to the brothers and sisters, and their legal representatives, of William D. Johnson, and one-half to the brothers and sisters and their legal representatives of Hannah M. Johnson. There is in the record an utter absence of any allegation or proof of any act or declaration by Mrs. Johnson, contemporaneous with the deeds, clearly and unqualifiedly creating such a trust and defining its terms and conditions. The allegations that she at some time indicated a desire that such should be the course of descent, and that she went so far as to consult counsel who advised her that the law would so distribute the property, and that she had treated the land as a part of the fund which had descended to her from her deceased husband, are of no significance. Acting on such mistaken advice she did nothing, by way of conveyance or will, to carry out her wish, and so her intention, if she had such intention, failed of fruition.

The judgments of the circuit court and of the court of common pleas are therefore.

Affirmed.

SHAUCK, C. J.; MINSHALL, WILLIAMS, BURKET
and SPEAR, JJ., concur.

BRUER ET AL. v. JOHNSON ET AL.

Rule that descent of real property follows the legal title—Does not apply to personal property—Section 4162, Rev. Stat.—Descent of estate by former husband or wife—Result where owner of personal property mingles same with common fund which is to follow statute.

The rule which prevails as to real property, that descent follows the legal title, does not apply to personal property; and where the owner of personal property, intending and desiring that it shall descend, upon the death of such owner, according to the provisions of Revised Statutes, section 4162, mingles the same in a common fund with property which is specifically within the terms of said section, and makes a partial distribution in accordance with such intention and desire, such fund is impressed with a trust that it shall so descend, and upon the death of the owner such fund will descend according to the provisions of section 4162.

(Decided January 22, 1901.)

ERROR to the circuit court of Clark county.

The facts appear in the opinion.

George Arthur, with whom were *Cunningham & Boggs* and *Cochran Rogers & Cochran*, for plaintiffs in error.

Chase Stewart, with whom were *John L. Zimmerman* and *George A. Beard*, for defendants in error.

DAVIS, J. This case was begun in the court of common pleas of Clark county, by the administrator of the estate of Hannah M. Johnson, deceased, to obtain the decision of the court as to the manner in which the personal property in the hands of such administrator should be distributed. The facts are very similar to those stated in *Russell et al. v. Bruer et al.*, ante, 1, the chief difference being that this

case involves the descent of personal property, instead of real property, as in the case referred to. The following finding by the court presents the essential facts, which must be considered in deciding the case:

"That the said Hannah M. Johnson, at the time of the death of said William D. Johnson, had no separate estate or property of her own, and that thereafter she never acquired any, excepting that which came to her from the said William D. Johnson, and such as she acquired with the proceeds and income thereof; that with the proceeds of a part of the personal property which came to her from said William D. Johnson she purchased real estate; that she did not set apart nor invest the personal property which came to her from said William D. Johnson as a separate fund, but that she commingled the proceeds thereof with the interest thereon and with the rents and income from the real estate in one common fund, and made disbursements therefrom without regard to the source from which it came, but she had been advised and believed and desired that all the real estate and personal property of which she should die possessed would pass and descend under the provisions of section 4162 of the Revised Statutes of Ohio, one-half to her brothers and sisters or their legal representatives, and one-half to the brothers and sisters or their legal representatives of the said William D. Johnson, and about ten years before her death, having given \$15,000 to his blood relations, she gave the same amount to her blood relations; and it was her express desire that the value of the real estate and personal property of which she might die possessed should not be less than the value of the estate received by her from him; that of the personal property of which the said Hannah M. Johnson died

possessed, 140 shares in stock of the First National Bank of Springfield, Ohio, and the household goods, books and pictures came to her from the said William D. Johnson under section 4159 of the Revised Statutes of Ohio; that the remainder of said personal property did not so come to her from him in the identical form in which the same was at the time of her decease, but such remainder is the proceeds of personal property which so came to her from said William D. Johnson, and is the remainder of the personal estate which came to her from the said William D. Johnson under the provisions of section 4159 of the Revised Statutes of Ohio."

The circuit court decreed that the administrator should distribute the personal estate of Hannah M. Johnson, as follows: One-half to the brothers and sisters, or their legal representatives, of said Hannah M. Johnson, and one-half to the brothers and sisters, or their legal representatives, of William D. Johnson.

The rule in Ohio that the course of descent of real property is controlled by the legal title, does not apply to personal property. The owner of personal property may, and generally does, acquire the title thereto in parol, and he may sell and transfer in parol, and as has been aptly said by a text writer of authority, "if he can transfer it by parol, there is no reason why he may not by parol transfer it upon such lawful terms, and to such uses and trusts, as he may desire. It has been so ruled in express decisions in the United States. When a person *sui juris* orally or in writing explicitly or impliedly declares that he holds personal property *in presenti* for another, he thereby constitutes himself an express trustee." Perry on Trusts, section 86.

The finding of the circuit court discloses that Mrs. Johnson not only mingled the property which came to her from her deceased husband with the proceeds thereof and interest thereon and with rents and income from the real estate which she possessed, in one common fund; but that she did this in the belief and desire that all of the personal property, and real estate as well, of which she should die possessed should and would descend, one-half to her brothers and sisters, or their legal representatives, and one-half to the brothers and sisters, or their legal representatives, of her deceased husband, William D. Johnson. In partial fulfillment of this desire and intention she gave to her husband's relatives \$15,000, and the same amount to her own relatives. Although, for the reasons stated in *Russell et al. v. Bruer et al.*, referred to above, she failed in the accomplishment of her desire as to her realty, we see no obstacle to carrying out her purpose as to the personalty. On this she has clearly and intentionally stamped the character of property which came to her under the provisions of section 4159, and became thereby a trustee for the beneficiaries so indicated, and upon her death it descended according to the provisions of Revised Statutes, section 4162. The judgment of the circuit court will be.

Affirmed.

SHAUCK, C. J. and BURKET, J., concur.

REED ET AL. v. GINSBURG & SONS.

SAME v. FRANK H. BLODGETT.

SAME v. DAVID E. BLODGETT.

Railroad mortgages and liens—Lien of mortgage on railroad covering after acquired property attaches, when.—Mechanic's lien for labor and material in improving real estate is subsequent to the lien of mortgage on after acquired property, when—Act of April 6, 1883—Section 3208, Rev. Stat.—Law of mechanic's lien.

The lien of a mortgage on a railroad covering after-acquired property, attaches at the time of the acquisition of the property, subject to all rights against the property then existing; but the lien of a mechanic's lien for labor and materials used in making improvements on real estate after the title to such real estate was acquired by the mortgagor, is subsequent to the lien of such a mortgage on after-acquired property, when such mortgage was executed before the passage of the Act passed April 6, 1883, now section 3208 of the Revised Statutes, and before the acquisition of the property, and was recorded before such materials and labor were furnished.

(Decided January 22, 1901.)

ERROR to the circuit court of Allen county.

The facts are stated in the opinion.

Harmon, Colston, Goldsmith & Hoadly and Doyle & Lewis, for plaintiffs in error.

Certain propositions may be assumed as settled. We understand they are not questioned.

A recorded mortgage, given by a railroad company on its roadbed and other property, creates a lien whose priority cannot be displaced thereafter, directly by a mortgage given by the company, nor indirectly by a contract between the company and a

third party for the erection of buildings or other works of original construction. *Railway Co. v. Hamilton*, 134 U. S., 296; 6 O. F. D., 537.

A mortgage covering a railroad built or to be built, and also all property thereafter acquired and used as part of the same, attaches to such property the moment it is acquired by the mortgagor. *Coe v. Peacock*, 14 Ohio St., 187; *Coopers & Clark v. Wolf*, 15 Id., 523; *Dunham v. Railroad Co.*, 68 U. S. (1 Wall.), 254; *Thompson v. Railroad Co.*, 132 U. S., 68; *Central Trust Co. v. Kneeland*, 138 U. S., 414; *Wade v. Railroad Co.*, 149 U. S., 327.

The mortgage, when it so attaches to after-acquired property, is inferior and subject to all liens and equities which existed upon it at the time it was acquired by the mortgagor or which arose from the acquisition itself. *Harris v. Bridge Co.*, 90 Fed., 322.

It may be conceded, therefore, that if the Ginsburg lien had existed when the company acquired title to the property, it would prevail against the mortgage, although the latter was long prior in date. It may even be conceded, for argument's sake, that if Ginsburg had, when the company obtained the title, already commenced the performance of a contract on whose completion he would be entitled to a lien, such lien, when duly taken, would reach back and prevail over the mortgage. But the Ginsburgs are not helped by this. The company had acquired title and consequently the lien of the mortgage had attached long before the Ginsburgs appeared on the scene.

The exact proposition they must maintain is that, no matter what the terms or conditions of a mortgage may be, a subsequent statute giving certain liens priority to the mortgage operates to displace such mortgage on property to which it has attached,

when such property was acquired after the passage of the law, in favor of liens the right to which arose and was perfected after the mortgage had so attached.

We submit that there is neither reason nor authority in favor of this proposition, and that its application would, moreover, in this case, cause the law in question to contravene section 10, article 1 of the federal constitution, which prohibits the states from passing any "law impairing the obligation of contracts."

The act of 1883, giving a lien to certain persons for work and material on railroads cannot have a retroactive effect so as to displace liens already created and recorded.

Feike v. Railroad Co., 12 C. C. R., 362, 5 Circ. Dec., 640; *Kelley v. Kelso*, 5 Ohio St., 198; *Bernier v. Becker*, 37 Ohio St., 72.

The act, section 3208, Rev. Stat., to be valid at all, must be construed to mean as if written: "Shall have precedence over any lien taken or to be taken, after the passage of this act;" otherwise it would be, for this reason, unconstitutional.

Section 3286 authorizes a mortgage on its property. Section 3287 authorizes a mortgage upon its property and income, and such mortgage may include personal as well as real property. Section 3288 relates to the recording.

This mortgage or trust deed embraced in its terms as fully as did the one before the court in the case cited, "all the following present and future to be acquired property of the company."

The present mortgage embraced all property, including additions, extensions, branches, now owned or hereafter to be acquired; it included all the income

of the property, all franchises and all legal and equitable interests.

When it acquired the right of way for this extension in 1893, as between the railroad company mortgage if the same is recorded in the recorder's and the mortgagee, that right of way became subject to the lien of the mortgagee.

Rails and ties, and other structures placed on that right of way, became a part of the railroad, and also subject to the mortgage, as much as would a house on a mortgaged lot.

Any statute is unconstitutional as impairing the obligation of contracts which introduces a change into the express terms of the contract or its legal construction, or its validity, or its discharge. The extent of the change is not material; any impairment of the contract is unlawful. Black's Const. Law, p. 525; *Bank v. Sharp*, 47 U. S. (6 How.), 301-27; *Life Ins. Co. v. Richardson*, 77 Fed., 395; Am. & E. Enc. Law, Vol. 15, p. 1047; Note Vol. 10 L. R. A., page 405; *Bronson v. Kinzie*, 42 U. S. (1 How.), 311; *Phinney v. Phinney*, 4 L. A. R., 348; *Yeatman v. King*, 2 N. D., 421; *Railroad Co. v. Hamilton*, 134 U. S., 296, 10 Sup. Ct. Rep., 546; 6 O. F. D., 537.

The state cannot interfere with the remedy given by existing laws to enforce a contract when the consequence is an impairment of the creditors' rights. This doctrine has perhaps been more frequently enunciated and applied in the cases of an attempted statutory extension of the mortgagor's right to redeem, made after the mortgage has been executed. *Scobey v. Gibson*, 17 Ind., 580; *Inglehart v. Wolfen*, 20 Ind., 32; *Rucker v. Steelman*, 73 Ind., 390; *Ex parte Pollard*, 40 Ala., 77; *Collins v. Collins*, 79 Ky., 88; *Coddington v. Bispham*, 36 N. J. Eq., 574; *Car-*

gill v. Power, 1 Mich., 369; *Maloney v. Fortune*, 14 Iowa, 417; *Phinney v. Phinney*, 81 Me., 450, 4 L. R. A., 348.

Railway bonds were secured by deed of trust. The legislature endeavored to give a preference in the earnings to claims which before the enactment of the law, had no lien on such earnings. It was held that: *Receiver v. Stanton*, 86 Tex., 620; *Phinizy et al. v. Railroad Co. et al.*, 63 Fed., 923; *Crowther v. Fidelity Ins., Trust & Safe Co.*, 85 Fed., 41, 42 U. S. App., 701; *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq., 605, 28 Atl., 595; *Nelson v. Railroad Co.*, 8 Am. Ry. Rep., 82; *Trust Co. v. L. St. L. & T. R. Co.*, 70 Fed. Rep., 282.

Cable & Parmenter and *J. M. McGillivray*, for defendants in error.

We maintain the decrees of the lower courts are correct for two reasons:

1. At the time the Ohio Southern Railway Company executed its mortgage, 1881, it had no authority to mortgage or acquire any property in Clinton or Greene counties, Ohio, and the finding of said mortgage in said counties would not thereby make the same a lien on said extension, by virtue of the after-acquired property clause therein contained.

2. Should we be in error as to the above proposition, and said mortgage became a lien on said Jeffersonville extension by reason of its provisions and the recording thereof as above stated, still we maintain the lien of said mortgage is subordinate to the said lien of defendants in error, and this is true notwithstanding the mortgage may have been filed for record at a date prior to the delivery of the rails by defendants in error. Jones on Corp. Bonds

and Mortgages, Sec. 105; *Hatry v. Railway Co., et al.*, 1 C. C. R., 426, 1 Circ. Dec., 238; *Meyer v. Johnson*, 53 Ala., 237; 64 Ala., 603; 28 N. J. Equity (1 Stewart), 49; *Coe v. Midland R. Co.*, 31 N. J. Equity, 145; *Branch et al. v. Jessup, etc.*, 9 Am. & Eng. R. R. Cases, 558. (U. S. Sup. Ct. Jany. 15th, 1883.); *Spies v. Railroad Co.*, 40 Am. & Eng. R. R. Cases, 401 (U. S. Cir. Ct. Southern Dist. of N. Y. Oct. 10, 1889); *Thomp. on Corp.*, Sec. 6197; *Rapalje & Mack's Digest*, Vol. 6, 425, *et seq.*; *Coe v. Railroad Co.*, 4 Am. & Eng. R. R. Cases, 520, s. c. 34 N. J. Equity, 266; *Calhoun v. Railroad Co.*, 9 Cent. Law Journal, 66; *Rutherford v. Railway Co.*, 35 Ohio St., 559; *Williamson v. Railway*, 28 N. J. Equity, 277, 29 N. J. Equity, 311; *Brooks et al. v. Railway Co.*, 101 U. S., 443; *Railway Co. et al. v. Lewton*, 20 Ohio St., 401; *Harris v. Youngstown Bridge Company et al.*, 90 Fed Rep., 322.

All the argument of counsel for plaintiff in error as to statutes being retroactive has no application to this case. They overlook the fundamental principle of the law that no man or corporation can give a mortgage upon property not by them owned; and that when a mortgage so given does eventually become effective and attach to something, it is subject to and restricted by the laws in force at the then time and not some fifteen years prior when the mortgage had no force or effect upon the property thereafter sought to be held under it.

The provision contained in the mortgage that it is to include property to be thereafter acquired by the mortgagor, does not create a lien upon such property at the time of the execution of the mortgage, because neither a person or corporation can mortgage property which is not then in existence.

Hence section 10, article 1 of the federal constitution has no application to this case. *Rousculp v. Railroad Co.*, 10 C. D., 621, 19 C. C., 436; *Cooley's Const. Limitations*, 6th Ed., pages 438-463; *Pierce v. Emery*, 32 N. H., 484; *United States v. Railroad Co.*, 79 U. S. (12 Wall.), 362; *Beall v. White*, 94 U. S., 382; *Beach on Eq. Jur.*, Sec. 817.

The difference between counsel in this cause is easily stated: Our opponents assume and contend they have some rights to said branch which we are trying to take away, while we deny that even today they have any interest in the distribution of funds arising from the sale of said branch, because of never having acquired a lien thereon.

Whether this be true or not may be immaterial in view of the fact that:

a. A mortgage takes effect and becomes a lien upon the property described in it, not from the date of its execution, but from the date of its being delivered to the recorder of the proper county for record. Sections 3289, 4133, Rev. Stat.

b. The date of execution of a mortgage is an immaterial matter, in a contention of priority between it and another lien. "As to third persons, mortgages have no effect either at law or in equity until delivered to the recorder of the proper county for record." *Bloom v. Noggle*, 4 Ohio St., 45; *Coe v. Railway Co.*, 10 Ohio St., 390; *Doherty v. Stimmel*, 40 Ohio St., 298.

It follows, therefore, that until the mortgage was recorded, it was not a lien as against third parties, and as it did not take effect until after the passage of the act of April 6, 1883, it became a lien (if at all) subject to the provisions of that act, and as the liens

under that act are prior to any lien "taken or to be taken," they are superior to that of said mortgage.

The trust company, as to this Jeffersonville branch, stands in no different or better position from what it would occupy if its mortgage had been executed in the spring of 1894. *Jones on Corp., Bond and Mortgages*, Sec. 105; *Hatry v. Railroad Co.*, 1 C. C., 434, 1 Circ. Dec., 238; *Meyer v. Johnson*, 53 Ala., 237; *Coe v. Railway Co.*, 31 N. J. Eq., 145; *Branch v. Jessup*, 106 U. S., 468; *Spies v. Railroad Co.*, 40 Am. & Eng. R. Cas., 401; *Coe v. Railroad Co.*, 34 N. J. Eq., 266.

c. Subsequently acquired property, in order to find its way under an "after-acquired property" clause must be described in the mortgage; to use the language of Justice Brewer, "It is settled that such a clause is valid, and that thereby the mortgage covers not only the property then owned by the railroad company, but becomes a lien upon all property subsequently acquired by it which comes within the description in the mortgage." *Trust Co. v. Kneeland*, 138 U. S., 414, 7 O. F. D., 1.

And again—the after-acquired property must be "appurtenant" to said line of railroad—note the language, "and all other property of every kind or nature, appurtenant to the said line of railroad, whether now held and owned by the party of the first part, or hereafter to be acquired, and particularly including all its coal and other lands and mines."

And as one tract of land cannot be appurtenant to another tract, one railroad or piece of a railroad cannot be appurtenant to another railroad. *Phila v. Railway Co.*, 58 Pa. St., 253.

d. If said branch was described in said mortgage and found its way under it, in virtue of the "after-

acquired" property clause, then the rule is that "a mortgage intended to cover after acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If the property is already subject to mortgages or other liens, the general mortgage does not displace them, although they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property, and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment or recognizance, can displace such mortgage for purchase money.

United States v. Railroad, 79 U. S. (12 Wall.), 362; *Harris v. Bridge Co.*, 90 Fed., 322; *Williamson v. Railway*, 28 N. J. Eq., 277, 29 N. J. Eq., 311; *Montgomery v. Keppel*, 75 Cal., 128; *Irrigation Co. v. Garland*, 164 U. S., 1.

And in the light of the further fact that under the act of March 20, 1889, sections 3201, 3202, 3203, 3204, 3205 and 3206, Rev. Stat. Mr. Blodgett being a contractor constructing said branch, was authorized to hold possession of the same until he was paid, as against the Ohio Southern Railroad Company; he took the necessary steps to fix his lien but was prevented from retaining possession by the appointment of the receiver, and seizure of the road by the court.

If it be suggested that this act is unconstitutional, the answer has already been given—the rights of the railroad company, and of the trust company (if any it had) were acquired in 1894, and subsequent to the passage of the act.

This matter was before the Supreme Court of the United States, where it was held: "In Iowa a mechanic's lien has preference over a prior recorded mortgage." *Brooks v. Railway Co.*, 101 U. S., 443.

DAVIS, J. The several defendants in error are claiming a preference in the application of the fund arising from the sale of the Ohio Southern Railroad under a decree of foreclosure. The plaintiffs in error are the purchasers of the railroad on behalf of the holders of the first mortgage bonds and the Central Trust Company of New York. The fund is insufficient to pay the amount of the outstanding first mortgage bonds, with the interest, and the defendants in error insist that mechanics' liens for materials and labor furnished by them respectively, in the construction of the Jeffersonville branch of the Ohio Southern Railroad are prior to the lien of the holders of the first mortgage bonds. The circuit court so held. 19 C. C., 436.

On May 23, 1881, the Ohio Southern Railroad Company made a mortgage or trust deed to the Central Trust Company to secure four million dollars of bonds. It was provided that 1920 bonds of \$1,000 each should be issued immediately, and the remainder at the rate of \$15,000 a mile for each and every mile of completed railroad, branch, extension or addition in excess of one hundred and twenty-nine miles, or when the purchase money of said bonds should be deposited in a suitable depository, to be used only for the purpose of constructing, etc., said line, or any *branch* or extension thereof. The property mortgaged was described as "all and singular the line of railroad of the party of the first part, extending from the city of Springfield in the county of

Clark, in the state of Ohio, through the counties of Clark, Madison, Fayette, Highland, Pike, Ross, Jackson, Gallia and Lawrence, in said state, to the village of Rockwood in said county of Lawrence, and to all *branches*, additions and extensions *pertaining thereto* * * * all materials and other supplies for the constructing, operating, maintaining, repairing or replacing, or for the operating, or improvement of the said railroad or any part thereof, or any part of its equipments or appurtenances. Also all rights, powers, privileges and franchises connected with or relating to the said line of road or the construction and maintenance, operation or improvement thereof, and all other property of every kind or nature pertaining to the said line of railroad whether now held and owned by the said party of the first part or hereafter to be acquired." It was provided that the liens of the bondholders as between themselves should be equal in priority.

In article 8 of said trust deed it was provided that the party of the first part "covenants and agrees that the entire proceeds of the sale of bonds secured hereby shall and will be faithfully and exclusively applied to the redemption of the one million dollars of bonds lately issued by the Springfield Southern Railroad Company, to the building, constructing, completing, equipping, extending, renewing, and replacing of the said railroad *and branches*. * * * *And that the said money shall not be appropriated to or used for any other purpose or purposes whatsoever.*"

This mortgage was filed for record in Fayette county on the 26th of May, 1881, and it was filed for record in Greene county, June 22, 1894, and in Clinton and Warren counties somewhat earlier, these with Fayette county being the counties in which what

was known as the Jeffersonville branch was located. It appears from the record that the railroad company acquired the right of way to the Jeffersonville branch by contract in 1883, and received deeds therefor during the year 1894. The defendants in error furnished materials and did work for the construction of the Jeffersonville branch from March, 1895, to May, 1895, and perfected mechanics' liens on the Ohio Southern railroad in May, 1895.

It does not appear in the record that any of the money paid for these bonds was actually applied to the construction of the Jeffersonville branch, nor does it definitely appear that it was not. But although the trustee, The Central Trust Company of New York, and the railroad company may not have applied the money strictly as provided in the trust, yet the holders of bonds purchased in the open market cannot be made to suffer for their delinquency. They should, at least, stand with equal favor before the court along with material men and laborers, so that the money furnished under this mortgage creates as strong an equity, appealing as forcibly to the conscience of the court, as that created by the furnishing of labor and materials.

The question made in this case is whether the mechanics' liens of the defendants in error are prior to the lien of the mortgage aforesaid upon the after-acquired property of the Ohio Southern Railroad, namely, the Jeffersonville branch. The circuit court seems to have based its conclusion upon a proposition of law stated by Taft, J., in the case of *Harris v. The Youngstown Bridge Co.*, 90 Fed. Rep., 322, to the effect that a mortgage covering after-acquired property attaches only to such interests as the mortgagor has at the time the mortgagor acquires the title thereto.

This had been decided in many cases before the one mentioned, and the proposition is not controverted in this case by anyone. It is even conceded that if the defendants in error had, when the company obtained the title to the Jeffersonville branch, already commenced the performance of a contract on the completion of which he would be entitled to a lien, such lien when duly taken would reach back and prevail over the mortgage. But just here the point of contention arises. When *did* the railroad company acquire title to the Jeffersonville branch? The circuit court seems to have assumed that the title was not acquired until the construction of the branch was completed, and that the lien of the defendants in error accrued in the acquisition of the property. If the circuit court had taken the trouble to read carefully the opinion of Taft, J., in the case cited, it probably would not have relied upon that case as authority for the judgment which it rendered. For example this: "It follows that *the lien* given by the after-acquired property clause of the first mortgage attached to the rights of way in the streets immediately upon the passage of the ordinances, and that improvements upon the rights of way only increased the security by becoming a part of the realty. The lien asserted by Harris, trustee, on this part of the terminals, *did not arise in the act of acquisition*, but only in the improvement after acquisition. * * * *It was the ordinance which passed the title, and not the laying of the tracks by its authority.*" *Harris v. The Youngstown Bridge Company*, 90 Fed. Rep. 332.

We take this to be the law, and applying that principle to the present case, the Ohio Southern Railroad Company acquired the title to the Jeffersonville branch when it acquired its right of way in 1893 and

1894. The claims of the defendants in error arose, not in the act of acquisition, but in making the improvements on the property *after* the acquisition, in the year 1895. If the case stood thus, there could be little doubt that the lien of the first mortgage was prior to the mechanics' liens. But what effect has the intervention of the statute of 1883, being now section 3208 of the Revised Statutes of Ohio? If the statute be prospectively construed, that is to say, if we construe it as though it should read "*shall have precedence over any lien taken or to be taken after the passage of this act,*" then it is contended that the mechanics' liens are still prior to the liens under the mortgage, because the right to a mortgage lien on the Jeffersonville branch was not acquired until the title in the Jeffersonville branch was acquired and the mortgage was recorded in the counties through which it runs, that is, in 1894, so that the statute would give priority to those mechanics' liens over a mortgage thus "taken" after the passage of the act. But the answer to this is that the contractual right of the plaintiffs in error to have a lien under the mortgage, was acquired at, and dated from, the time of its execution in 1881, and simply attached to and became operative upon, the after-acquired property, on the acquisition of the property in 1894. The argument that the mortgage on after-acquired property is operative only as a contract to mortgage and that a new mortgage must be executed in order to acquire a lien in behalf of the bondholders on that property, is untenable and hardly calls for analysis. But whether the instrument of 1881 be a mortgage or a contract for a mortgage, it must be conceded that it conferred a contractual right upon the bondholders to have the first lien on the after-acquired property,

and hence, if the statute of 1883 be construed so as to defeat that right, then the statute is retroactive, and impairs the obligation of the contract, and it is so far unconstitutional and void.

We therefore conclude that the court of common pleas and the circuit court were in error in deciding that section 3208 does not violate any contract obligation held under and by virtue of this mortgage; and, in holding that it is not retroactive as to the mortgage of 1881, if it be held that, by force of the statute, the mechanics' liens of the defendants in error have priority thereto.

The judgment of the court of common pleas and that of the circuit court are reversed and judgment is rendered for the plaintiffs in error.

Reversed.

SHAUCK, C. J.; BURKET and SPEAR, JJ., concur.

MINSHALL and WILLIAMS, JJ., dissent.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY v. BEMIS.

Time of commencing action—Sections 4983 and 4991, Rev. Stat.—Suit for false imprisonment brought in United States circuit court—Against two corporations, one resident of New York and one of Ohio—Demurrer of New York corporation sustained—Ohio corporation pleaded non-jurisdiction and case dismissed—Proceeding held to be commencement of action.

A party brought, within proper time, suit for false imprisonment in the United States circuit court for the southern district of Ohio against two corporations, one a resident of the state of New York and the other a resident of Ohio. The Ohio corporation answered to the merits. The New York corporation demurred to the petition for that the same did not state facts sufficient to constitute a cause of action, which was sustained and judgment given for that company against the plaintiff. The Ohio corporation then, by amended answer, pleaded that the court was without jurisdiction for the reason that there is no controversy between the citizens of different states. The cause was then heard on the motion of defendant to dismiss, which was sustained and the cause dismissed on the ground that the court had no jurisdiction over the parties or subject matter. *Held:* That the proceeding was the commencement of an action, within the meaning of section 4991, Revised Statutes; that the plaintiff failed otherwise than upon the merits, and is entitled to commence a new action within one year from such date although, under section 4983, Revised Statutes, his action would be barred.

(Decided January 22, 1901.)

ERROR to the Superior Court of Cincinnati.

The action below was by Frank Bemis against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to recover damages for false imprisonment. It appeared by the petition that the action was brought more than one year from the time the cause

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of action arose, but that within one year from such time a suit had been brought on the same cause of action in the United States circuit court. Also that the Wagner Palace Car Company, a New York corporation, was made defendant in the action in the circuit court, and that, a demurrer to the petition by that company being sustained, it was dismissed from the action. It further appeared that afterwards the plaintiff's case was dismissed by the circuit court on the ground that that court was without jurisdiction of parties or subject matter because there is no controversy between citizens of different states.

To the petition in this case the defendant Company demurred on the ground that the claim was barred by the statute of limitations. This demurrer was sustained by the Special Term, and the case dismissed. In the General Term this judgment was reversed and the Company brings error.

Wm. W. Ramsey, and Maxwell & Ramsey, for plaintiff in error.

Thos. L. Michie and Joel C. Clore, for defendant in error.

SPEAR, J. It is conceded that the action is barred and that the dismissal of the case by the court below at Special Term was right, and its judgment should be affirmed and the judgment of reversal by the General Term reversed, unless the cause is saved by section 4991, Revised Statutes, which is as follows: "If, in an action commenced, or attempted to be commenced, in due time, a judgment for the plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal

or failure, expired, the plaintiff * * * may commence a new action within one year after such date."

But the contention of counsel for plaintiff in error is that the cause does not come within the provision of the section, for the reason that the circuit court never had jurisdiction of the case, and therefore no action was ever commenced; the whole proceeding in that court being a nullity. They cite, in support of this proposition, the case of *Sweet v. Electric Light Company*, 97 Tenn., 252, where it is held that: "The commencement of suit in a court having no jurisdiction thereof is not within Code, section 3449 (M. & V.), providing that, if an action is commenced within the term limited by the statute of limitations, and judgment rendered therein against the plaintiff on grounds which do not conclude his right of action, a new action may be commenced within a year thereafter, even if the term of the statute had then expired." The court also say: "An action commenced in a court not having jurisdiction to entertain it is no action in the sense of the statute. The matter stands the same as if no suit had been brought or attempted to be brought, and the limitation runs from the date of the injury. If the action is brought in a court without jurisdiction, the whole proceeding is void and of no effect."

It is further contended by counsel that there was not even an attempt to commence an action because, the commencement of an action implying that it must be begun in a court of competent jurisdiction, it follows necessarily that the attempt to commence the action must be brought in a court of the same character. And, besides, the words "attempt to commence an action" in this connection are defined by

section 4988, Revised Statutes, as follows: "An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter, when the party diligently endeavors to procure a service; but such attempt must be followed by service within sixty days."

We are of opinion that the entire position of counsel rests upon a misconception of the import of the term "action." It lies in assuming that, in order to constitute a proceeding in a court "an action," the court must be competent to adjudicate the rights of the parties, and render a final judgment determining such rights, and that, therefore, the proceeding instituted and pending in the United States court was something else than an action. Our code abolished the distinctions theretofore existing between actions at law and suits in equity, and the forms of such actions and suits, and provided how actions should be commenced, but it nowhere undertook to define an action. That was left to the common understanding of the profession. In several of the state codes it is given thus: "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Code California, section 22; Code N. Y., section 2; Code N. C., 126. Bouvier, in his Law Dictionary, page 88, defines an action to be: "The formal demand of one's right from another person or party made and insisted on in a court of justice." The same definition is given in substance by Black in his Law Dictionary. Rapalje & Lawrence define it as: "A civil proceeding taken in a court of law to enforce a right." Abbott in his Law Dictionary, page 21, observes: "A term which is used

so often must insensibly acquire some variations of meaning. Thus action, in its broadest sense, includes all the various proceedings ordinarily allowed in courts of justice; more narrowly, and as opposed to prosecution, it includes the modes allowed to individuals for enforcement of civil rights or redress of private wrongs, excluding proceedings instituted by the government for the punishment of offenses; or, as opposed to suit, it means an ordinary proceeding according to the course of courts of law, excluding resort to equity or to remedies of equitable cognizance." Mr. Waite, in his work on Actions and Defenses, 10, gives this: "A civil action is one prosecuted for the establishment or the recovery of a right, or the prevention of a wrong, or the redress of an injury. * * * The term 'action' includes all the proceedings from its commencement to its termination; and, therefore, the proceeding is called an action until the rendition of the decision, decree or judgment." Professor Field, in his Lawyers' Briefs, has this: "In a legal sense an action is a mode of proceeding in court for the enforcement of a private right or the redress or prevention of a private wrong, or the punishment of a public offense." In the Matter of Hunter, 6 Ohio, 500, it is observed by Wright, J.: "Action may be defined as an abstract legal right in one person to prosecute another in a court of justice; and suit is the actual prosecution of such right in a court of justice." In no text book, and in no reported case cited to us save *Sweet v. Electric Light Company*, *supra*, is there any statement or intimation that the question of the jurisdiction of the court has any potency whatever in determining what is, and what is not, an action, and we are convinced that in Ohio, whatever may be the rule elsewhere, there is

no authority for the distinction which counsel seek to draw, and we are equally clear that it rests upon no substantial ground. If right as to this, then the conclusion inevitably follows that the dismissal for want of jurisdiction does not take the case out of the effect of the remedial statute, for the proceeding, whatever it may have been, was properly commenced; the defendants appeared, one by general demurrer and the other by answer.

Another view of the statute leads to the same result. Whether, within the meaning of section 4991, the suit brought in the United States court amounted to the commencement of an action or not, nevertheless, the plaintiff having shown by its petition that he had a cause of action, and having presented it in the usual way to a court of justice, one which, had the parties been residents of different states, would have had full jurisdiction to hear and determine their rights, must be held to at least have attempted to commence an action, unless the failure to bring it in a proper court is to be regarded as negligence, laches, or a want of good faith. It is claimed by plaintiff in error that the failure should be condemned on that ground, and that the bringing of the suit in the circuit court can have no more force than if the petition had been filed before a justice of the peace, or a mayor, or a police judge. To properly pass upon this it may be well to consider how other courts have treated cases involving kindred questions.

The rule in equity respecting the effect, generally, of the dismissal of an action, has not been in doubt. In *Hughes v. United States*, 4 Wall., 232, a chancery case, where there had been a bill dismissing a former suit for want of jurisdiction, and for absence of proper parties, and on the ground that the petition

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was defective, uncertain, and insufficient in the statement of the cause of action, Mr. Justice Field states the rule thus: "It requires no argument to say that judgments like this are no bar to the present suit. In order that the judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties, or their privies, and the point in controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defective pleading, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any grounds which do not go to the merits of the action, the judgment rendered will prove no bar to another suit." He cites: *Walden v. Bodley*, 14 Pet., 156, and *Greenleaf on Ev.*, sections 529 and 530. See, also, *Spear v. Newell*, 13 Vt., 293.

The rule is not different at law respecting the rule of *res judicata*. Nor, as we think, do the authorities justify the conclusion that a mistake as to jurisdiction should work irreparable prejudice. *Smith v. McNeal*, 109 U. S., 426, involved an application of the same section of the Tennessee statute which is invoked in *Sweet v. Electric Light Company*, *supra*. The first suit was brought in the circuit court of the United States for the western district of Tennessee, for the recovery of land, within the seven years prescribed by the statute of limitations of that state. It was dismissed, and the second suit was brought within one year thereafter, but more than seven years after the cause of action arose. The court dismissed the suit on the ground that it had "no jurisdiction of the cause of action in plaintiff's declaration alleged and set forth." An additional fact existed which, if pleaded, would have given the court jurisdiction.

Mr. Justice Woods, in the opinion, says: "The first suit was dismissed because the declaration did not state jurisdictional facts upon which the right of the court to entertain the suit was brought." And the court held the party entitled to the benefit of the remedial article of the Tennessee code, the first judgment not being "upon any ground concluding their right of action, nor have they been guilty of such negligence or carelessness in the bringing of the first suit as should exclude them from the benefit of the said article." And in support of the latter proposition the learned Justice cites the following cases: *Cole v. The Mayor and Aldermen of Nashville*, 5 Cold. (Tenn.), 639; *Memphis & Charleston R'd Co. v. Pillow*, 9 Heiskell, (Tenn.), 248; *Weathersly v. Weathersly*, 31 Miss., 662; *Woods v. Houghton*, 1 Gray, 580; *Coffin v. Cottle*, 16 Pick., 383; *Givens v. Robbins*, 11 Ala., 156; *Skillington v. Allison*, 2 Hawkes (N C.), 347; *Lansdale v. Cox*, 7 J. J. Marsh. (Ky.), 391; *Phelps v. Wood*, 9 Vt., 399; *Spear v. Newell*, 13 Vt., 288; *Matthews v. Phillips*, 2 Salk., 424; *Kinsey v. Heyward*, 1 Ld. Raym., 432.

A reference to some of these will shed further light on the subject. *Woods v. Houghton*, 1 Gray, 580, was an action of contract brought in the county of Worcester. A previous action to recover on the same note had been brought within the life of the note in another county against the defendant and a trustee, neither of whom resided in that county, and was dismissed or abated, on motion of the defendant, for want of jurisdiction. This was set up as a bar and it was there argued, as it is here, that the court having no jurisdiction over it, it was a nullity, but the court held otherwise. The statute provided if, in any action duly commenced within the time allowed

therefor, the right shall be abated or the action otherwise defeated for any matter of form, the plaintiff may commence a new action, etc. Metcalfe, J., in the opinion, used this language: "The words used in the statutes declaring the cases in which a second action may be maintained after a failure of the first, have always been construed favorably for the plaintiff, and never have been held to have a technical meaning; but as said by Shaw, C. J., in *Coffin v. Cottle*, 16 Pick., 386, are meant to declare that 'where the plaintiff has been defeated by some matter not affecting the merits, some defect or informality which he can remedy or avoid by a new process, the statute shall not prevent him from so doing provided he follow it promptly by suit within a year.'" *Allen v. Sawtelle*, 7 Gray, 165, was an action on a note. A former suit had been dismissed on motion of the defendant for the reason that it had not been seasonably entered on the docket by the clerk. Herrick, J., observes: "It is certain that the plaintiff did not mean to permit his debt to remain for such length of time as would bar him from its recovery, without an attempt to enforce it. He used the diligence required by the law when he instituted his first suit against the defendant." The second action was sustained. *Caldwell v. Harding et al.*, *Admrs.*, 1 Lowell's Decisions (U. S. C. C., district of Mass.), 326, was an action on an insurance policy. Defense, the bar of the statute of limitation of Massachusetts, which limits actions against administrators to two years after giving bond. Reply that a previous case brought in the United States court for the southern district of New York, was dismissed otherwise than on the merits and the exception of the Massachusetts statute. The first case was decided for defendants on the sole ground

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that the court had no jurisdiction of actions against administrators appointed in and under the laws of Massachusetts. In disposing of the case, Lowell, J., remarks: "The Supreme Court of Massachusetts have given to this exception a liberal interpretation in favor of meritorious creditors. The tendency of their decisions is to bring all mistakes which have defeated actions, independently of their merits, within the saving of the statute." And the second action was maintained. *Young v. Davis*, 30 Ala., 213; *State Bank v. Magness*, 6 Eng. (Ark.), 343, and *McCormick v. Eliot*, 43 Fed. Rep., 469, give effect to a similar spirit in interpretation. That the code generally is to be liberally construed to promote the ends of justice, and that section 4991 is entitled to the same liberal treatment, see *Meisse v. McCoy*, 17 Ohio St., 225; *Treasurer v. Martin*, 50 Ohio St., 197, and see also *Stahl v. Van Fleck*, 53 Ohio St., 136, and *Burgoyne v. Moore*, 12 O. C. C., 31.

It is not to be understood that the statutes of the several states are identical, either in form or language, with our own. But there is a striking and significant similarity in general effect. The Tennessee Code is not as broad as ours inasmuch as our statute gives remedial effect to an attempt to begin an action, which the statute of our sister state does not; and no statute which has come within our notice is more liberal in terms than ours. In this connection attention may be given to the citation by counsel of section 4988 as having an important bearing upon the question by giving a meaning to the words "attempt to commence an action." That section is to the effect that an attempt shall be deemed equivalent to a commencement where a party endeavors to procure a service and procures it within sixty days. The

pertinency of the objection is not apparent. Section 4987 is to the effect that an action shall be deemed commenced within the meaning of this chapter as to each defendant at the date of the summons which is served on him, etc., and the succeeding section (the one cited) would seem to have for its purpose only the helping out of a party who had failed in his first effort to procure service. It does not in terms, and we think not by inference, exclude other appropriate meanings which naturally belong to the words.

Nor will we be understood as intending that the cases heretofore referred to are on all fours with the case at bar. A number are not. But we are unable to see why *Smith v. McNeal* does not cover the case adequately, and the others do clearly show the trend

judicial opinion, and that it is in the direction of the conclusion we have announced.

It must be conceded that the weight of authority supports the proposition, as a general rule, that a dismissal of a former suit for want of jurisdiction in the court in which it is brought is such a failure as will not constitute a bar to another action; and it seems fairly well established that such a dismissal will leave the plaintiff, by favor of the remedial statute where such exists, to pursue his remedy farther, even though by the general statute of limitations his action would be barred. But to avoid the effect of the general proposition as applied to this case, counsel seek to draw a distinction which, reduced to its last analysis, is that even though a dismissal for want of jurisdiction of the parties, or for defect in bringing the real case before the court where if all the facts were stated, it would have jurisdiction, should be held not to prevent the bringing of an action within statutory time thereafter, yet that the bringing of

such a suit in a court which cannot possibly acquire jurisdiction of the subject matter of it, as it is urged, is the fact in the case at bar, is equivalent to the filing of the same before a justice of the peace, or mayor, or the police court, and is a nullity. In other words, inexcusable laches and bad faith is shown. This matter of laches and of bad faith is treated in many cases as of prime importance. In *Anderson v. Bedford*, 4 Cold. (Tenn.), 464, it is held that an action dismissed by the court during trial for champerty on the part of the plaintiff shown by the evidence, is not within the exception, the court, Millikin, J., remarking that "in no case of which we are advised, when the failure of the action is due to default, wrong or laches of the plaintiff, has it been sufficient to authorize the bringing of another suit under the exception of the statute." But how does the laches or bad faith appear? The proposition is, that a lawyer may make a mistake in the bringing of an action, as to whether the court may acquire jurisdiction of the parties, or in the statement of jurisdictional facts, and for either reason fail, and it will not, under the authorities, preclude his client from another effort; but if he make a mistake respecting the jurisdiction of the court generally, and so fail, his client is without further remedy. The distinction carries the point of technicality to the extreme limit, and is, we think, too fine. It fails to distinguish because of any principle involved. Questions of jurisdiction are often of the very nicest which lawyers have to determine for their clients and courts to decide for litigants. It is not given to all lawyers to know all the law, or all the decisions of courts; indeed instances are not wanting where courts themselves have shown ignorance in both respects. Un-

usual acumen and prescience is not demanded and we think it clearly unreasonable to compare the mistake in the present case as akin to the bringing of such a case before a justice of the peace or a mayor. To presume the United States court would have jurisdiction in a cause against two defendants, one of whom was a citizen of another state, and to be ignorant of holdings by United States courts to the contrary, (if such decisions have been made), however mistaken, can hardly be treated as importing negligence or bad faith, and it is significant that the defendant company, present plaintiff in error, did not plead want of jurisdiction until the case had been in court over a year, and then by an amended answer. It is matter of common knowledge that corporations, and especially railroad companies, where sued in a state court, are solicitous of procuring removal to a United States court, and it is not unfair to impute to counsel the supposition that, by going in the first instance to the latter court, they would shorten the controversy.

It is not reasonable, we think, to conclude that the legislature intended, by the section in question, to favor suitors who had failed in a former suit because of the lack of jurisdiction of the parties, or because a jurisdictional fact, though existent, had not been stated, and deny like favor to suitors who had happened to fail because the court in which their attempt had been made was without jurisdiction of the action on the facts as they actually existed. If such distinction was intended we utterly fail to see any principle on which it could find support. On the other hand it seems quite apparent that the intention was to secure that class of suitors from loss, who, without laches or fault, but from causes incident to the ad-

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ministration of the law, are compelled to abandon a present action without a determination of its merits, and give to such, without distinction, an opportunity in reasonable time within the statute, to renew such action.

Our conclusion is that the proceeding in the United States court was the commencement of an action within the meaning of section 4991, Revised Statutes, and that the plaintiff, having failed otherwise than on the merits, is entitled to maintain a second action.

Judgment affirmed.

SHAUCK, C. J., and MINSHALL, WILLIAMS, BURKET and DAVIS, JJ., concur.

MILLER ET AL. V. HIXSON AS TREASURER OF HIGHLAND COUNTY.

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Retroactive laws—Statute imposing new or additional burden, etc., as to past transactions is retroactive—And in conflict with Sec. 28, Art. 2, of the constitution—Invalidity of Sec. 4812, Rev. Stat.—Act of April 17, 1886—Secs. 4814 and 4815, Rev. Stat., not applicable to pikes constructed in special taxing districts, when—Purchaser of bonds under One Mile Pike Law bound to take notice of limitation of taxation, when—Result of mistake by purchaser—Constitutional law.

1. A statute which imposes a new or additional burden, duty, obligation, or liability, as to past transactions, is retroactive, and in conflict with that part of section 28, article two of the constitution, which provides that, "The general assembly shall have no power to pass retroactive laws."
2. The amendment of section 4812, Revised Statutes, 33 O. L., 85, passed April 17, 1886, adding five years to the period for which extra taxes might be levied under the One Mile Pike Law, is retroactive and void as to such pikes as had been constructed before the passage of that amendment.

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3. Sections 4814 and 4815, Revised Statutes, are not applicable to pikes constructed in special taxing districts where the extra tax for such pike is required to be levied alike on the valuation of both real and personal property within the district.
4. A purchaser of bonds, issued under the One Mile Pike Law, is bound to take notice of the limitations upon the power of taxation, the extent of the special taxing district, and of the valuation of the property therein; and if he makes a mistake, the loss must fall upon him, rather than upon the property owners in such special district.

(Decided January 22, 1901.)

ERROR to the circuit court of Highland county.

A. L. Miller and his associates, plaintiffs in error, and also plaintiffs below, filed their petition in the court of common pleas on April 9, 1897, against Charles E. Hixson as treasurer of Highland county, which petition, omitting the caption and signatures, is as follows:

“The plaintiffs state:

“1. They have been heretofore taxpayers on a certain free turnpike in said county, known as the Hillsboro and West Union free turnpike road number 51.

“The question to be determined herein is one of a common interest of many persons, who have also been taxpayers on said free turnpike, and the plaintiffs bring this suit for all such taxpayers.

“2. On the fifth day of February, A. D., 1883, certain landholders owning lands within one mile of said free turnpike presented a petition to the board of commissioners of Highland county, Ohio, asking the appointment of commissioners to lay out and establish a free turnpike road between the corporation line of the village of Hillsboro and the crossing of Brush creek, at Johnson Forge, within said county, and stated in said petition that they desired the county

commissioners to levy an extra tax, not to exceed ten mills on the dollar valuation in any year, on the lands and taxable property within the bounds of the road, and that they desired said tax to continue eight years.

"3. Thereupon the county commissioners of said county, on the seventh day of February, A. D.. 1883 ordered 'that the prayer of said petition be granted and said road be established a free turnpike road,' said free turnpike to be denominated 'The Hillsboro and West Union free turnpike road No. 51,' and that a tax of ten mills for the period of eight years on all the property, both real and personal, each year be levied for the construction of said free turnpike road, and appointed three freeholders of said county to be commissioners of such free turnpike road, who duly qualified as such commissioners and proceeded to lay out and establish such free turnpike road between the points named in the petition, and returned to the county commissioners a map and profile of such road, including on the map, as nearly as could be done, the names of the land owners whose property would be liable to be taxed for its construction .

"4. Thereupon such proceedings were had by the board of commissioners, and the auditor of said county, that a tax of ten mills on the dollar for the term of eight years was, by said auditor, entered upon the tax duplicate of said county on all the lands and taxable property within the bounds of said road as laid out and established, for the purpose of constructing the same; and the road commissioners theretofore appointed, proceeded in its construction.

"5. The original petition presented to the board of commissioners of Highland county, as aforesaid, was not renewed at the expiration of eight years from the time said tax was levied.

"6. On the seventh day of July, A. D., 1884, the county commissioners of Highland county, by an order entered on their journal, continued the tax originally levied for constructing said road, 'at the rate of ten (10) mills on the dollar on all land and taxable property within the bounds of said road, for the period of five years in addition to said levy heretofore made,' and 'further ordered that the county auditor enter the same upon the duplicate for collection according to law.'

"7. Thereupon the auditor of said county, in pursuance of said action of said commissioners, did enter upon the tax duplicate of said county ten mills upon the dollar upon all lands and taxable property within the bounds of said road for the period of five years in addition to that originally levied for the term of eight years, as asked for in the petition for said turnpike.

"8. The period of time during which taxes could be levied upon lands and personal property within the bounds of said free turnpike road and collected, to pay for its construction or any indebtedness incurred in its construction, expired with the December annual payment of taxes for the year A. D., 1895; that being the limit of time for the levy and collection of such taxes as fixed by the petition for said road, the aforesaid action of the county commissioners of Highland county, and the law of Ohio authorizing the construction of such free turnpike in pursuance of such petition, as such law existed at the time such petition was filed, and for a long time thereafter, and until all contracts for the construction of said road had been made and said road completed.

"9. On the fifth day of September, A. D., 1887, the commissioners of Highland county, by an order en-

tered on their journal, continued the tax originally levied for constructing said road for another period of five years, beginning at the expiration of the first extension of time for five years, as hereinbefore set forth, at the rate of ten mills on the dollar on all lands and personal property within the bounds of said road, and further ordered that the county auditor enter the same upon the duplicate for collection.

"10. Thereupon the auditor of said county, in pursuance of said last mentioned action of said commissioners, did enter upon the tax duplicate of said county ten mills on the dollar upon all the lands and personal property within the bounds of said road for the period of five years, in addition to that of eight years in pursuance of the petition for said road, and in addition to that of five years as the time for the levy of said taxes was first extended as aforesaid.

"11. Said duplicate has come into the hands of the defendant, the treasurer of said county. Said treasurer, the defendant, is proceeding to collect, and will collect, the taxes levied by the auditor of said Highland county, in pursuance of said last mentioned action of the commissioners of said county, unless restrained.

"12. The action of the commissioners of Highland county, hereinbefore set forth, whereby they attempted to extend the time for the levy and collection of said taxes for a period of five years in addition to the period of eight years fixed by the petition for said road, and in addition to the period of five years during which the time was first extended for the levy and collection of such taxes, is illegal and void. The action of the auditor of said county, in pursuance of said action of the county commissioners, and the

action of the defendant, in pursuance thereof, as above set forth, is illegal and void.

"Wherefore the plaintiffs pray that until the final hearing of this cause the defendant may be temporarily enjoined from collecting said taxes or any part thereof, and that upon final hearing he may be perpetually so enjoined, and for any and all relief to which they and those for whom they sue may be entitled."

To this petition the treasurer, defendant below, and defendant in error here, demurred on the ground that the petition does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court and exceptions noted; and on leave an amendment was filed to the petition as follows:

"The plaintiffs, having obtained leave of court so to do, amend their petition heretofore filed herein by inserting at the end of the fourth paragraph thereof, the following:

"4a. Said road commissioner, in laying out and establishing said free turnpike, and in returning to the board of county commissioners a map and profile of said road, including thereon the names of the landholders whose property would be liable to be taxed for its construction, by mistake included within the bounds of the taxing district, as so reported, all the lands within one mile on either side of said road, although certain unimproved county roads unconnected with the same ran upon either side thereof within less than two miles. Afterwards, by the decree and judgments of this court, duly made, in divers suits brought by land owners whose lands were more than one-half the distance between said free turnpike and said unconnected roads, the lands and

personal property so lying beyond one-half such distance were released from taxation on said free turnpike, and the bounds of said taxing district and the quantity of lands and personal property liable to be taxed for the construction of said free turnpike were largely reduced.

"4b. Said road commissioners issued bonds for the purpose of constructing said free turnpike. A part of said bonds were made payable at a date exceeding the number of years set forth in the petition. The taxes levied upon said taxing district by virtue of said petition and the proceedings thereunder, for the construction of said free turnpike, were not "divided in such manner as to meet the payment of the interest and principal of said bonds."

"4d. There is now outstanding and unpaid of said bonds, so issued and sold, the sum of fourteen thousand and ninety-one dollars and fifty-eight cents, principal and interest. There are now outstanding and unpaid certificates of indebtedness issued by said road commissioners to pay for work and material in the construction of said free turnpike, the sum of twenty-four hundred and seventy dollars and fifty-seven cents, principal and interest.

"4e. The full amount realized annually from the levy of taxes upon the lands and personal property in said taxing district, as the same has been reduced as aforesaid, for the payment of said indebtedness is insufficient to pay the interest annually accruing thereon."

This amendment was stricken out on motion of defendant as being irrelevant, and exception taken. The plaintiffs not desiring to further plead the court held the petition to be insufficient and dismissed it at costs

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of plaintiffs, to all of which plaintiffs excepted. The circuit court affirmed the judgment, and thereupon the plaintiffs came here for relief.

Huggins & Watts, for plaintiffs in error, cited the following authorities: *Cooley on Taxation*, 479 (1st Ed.); *Sedgwick on Construction of Constitution*, 194; *Gillman v. Kansang*, 4 J. R., 45; *McCabe v. Emerson*, 6 Har. Penn. R., 111; *Rairden et al. v. Holden*, 15 Ohio St., 207; *The Society v. Wheeler*, 2 Gallison R., 139; *Bow v. Norris*, 4 N. H. R., 16; *Clark v. Clark*, 10 N. H. R., 380; *Greenlaw v. Greenlaw*, 12 N. H. R., 200; *Kennetts Petition*, 4 Fasties R., 139; *Cincinnati v. Seasingood*, 46 Ohio St., 296; *Trustees, Cass Tp. v. Dillon*, 16 Ohio St., 38; *State ex rel. Anderson v. Harris*, 17 Ohio St., 608; *State ex rel. Bates v. Richland Tp.*, 20 Ohio St., 362; *Ohio ex rel. Holtz v. Commissioners*, 41 Ohio St., 423; *Clark v. Clark*, 10 N. H., 380; *Davis v. Minor*, 1 How., 183; *Woart v. Winnick*, 3 N. H., 483; *Insurance Co. v. Flynn*, 38 Mo., 483; *Kennebec Purchase v. Laboree*, 2 Greenland, 275; *Aldridge v. Railroad Co.*, 2 Stew and P., 199; *Rawls v. Kennedy*, 23 Ala., 240; *Towle v. Railroad Co.*, 18 N. H., 547; *Bellevue v. Peacock*, 89 Ky., 495; *Cooley on Taxation*, 2 Ed., 678 and 328; *Cooley Const. Lim.*, 289, (4th Ed.); *Dillon on Mun. Corp.*, 521 and note; *State v. Kirkley*, 29 Md., 85; *Gould v. Sterling*, 23 N. Y., 464; *Clark v. Des Moines*, 19 Iowa, 209; *Veeder v. Lima*, 19 Wis., 280; *Oakland v. Skinner*, 94 U. S., 255; *Clark v. Gram*, 5 Mich., 154; *Torreo v. Milbury*, 21 Pickwick, 67; *Johnston v. Becker Co. Coms.*, 27 Minn., 64; *State ex rel. Treadwell v. Commissioners*, 11 Ohio St., 183; *Aspenwall v. Commissioners*, 62 U. S. (21 How.), 539; *Bowles v. State*, 37 Ohio St., 35; *Carlisle v. Hetherington*, 47

Ohio St., 245; *Norwood v. Baker*, 172 U. S., 269; *Waln v. City of Beverly*, 56 At. Rep., 709; *Holliday's Exrs. v. City of Atlanta*, 96 Geo., 377.

I. McD. Smith and Geo. L. Garrett, for defendant in error, cite the following authorities: *Baker v. Cincinnati*, 11 Ohio St., 534; *Anderson v. Brewer*, 44 Ohio St., 576; *Cooley on Taxation*, 3; *McCullough v. Maryland*, 17 U. S. (4 Wheat.), 428; *Mech. & Traders Branch Bank v. DeBolt*, 1 Ohio St., 592; *Toledo Bank v. Bond*, 1 Ohio St., 623; Const. Art. 2, Sec., 28; *Cooley on Taxation*, 2 Ed., 685, 328, 76, 291; *Burroughs on Public Securities*, 546; *U. S. v. County of Clark*, 96 U. S., 211; *State ex rel. Bates v. Richland Tp.*, 20 Ohio St., 362; *Commissioners v. Greene*, 40 Ohio St., 318; *Burgett v. Norris*, 25 Ohio St., 308; *State ex rel. Holtz v. Commissioners*, 41 Ohio St., 422; *Butler v. Toledo*, 5 Ohio St., 232; *State ex rel. v. Cincinnati*, 52 Ohio St., 452; *DeBolt v. Ins. Co.*, 1 Ohio St., 585; *State ex rel. Bates v. Richland*, 20 Ohio St., 369.

BURKET, J. The road in question was a free turnpike road constructed under the "One Mile Assessment Pike" statute, passed March 29, 1875, 72 O. L., 93, and its amendments, and carried into the Revised Statutes as chapter seven, title seven, section 4774 and following sections.

Section 4774 provides that a petition shall be signed and presented to the county commissioners by a majority of those who own lands within the bounds of a free turnpike, asking for the appointment of commissioners to lay out and establish a free turnpike road between certain named points, stating in such petition that they desire the county commissioners to levy

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an extra tax the amount of which shall not exceed ten mills on the dollar valuation in any year. on the lands and taxable property within the bounds of the road, and also the number of years they desire the levy to continue, not exceeding eight years. By section 4777 it is provided that no such tax shall be levied for an amount or for a term of years greater than that set forth in the petition, unless the petition be renewed, or the county commissioners order an extension of the levy for the purposes stated in section 4812. There was no renewal of the petition in this case. Section 4812 then in force reads as follows:

"Section 4812. The provisions of this chapter shall extend and be applicable to all free turnpike roads heretofore built, now in process of construction, or hereafter to be constructed; and at any time when the county commissioners shall deem it necessary for the purpose of providing the means for completing the same, and liquidating any indebtedness incurred on account of such road, they may continue the tax originally levied for constructing the same for a period not exceeding, in the aggregate, five years, in addition to the levy made on petition, as provided in section forty-seven hundred and seventy-seven."

As the statute stood when the road in question was petitioned for and constructed, the commissioners had authority to levy ten mills on the dollar each year for eight years by virtue of the petition for the road, and for five years longer by virtue of said section 4812, making in all thirteen years. The ten mills on the dollar of the valuation of real and personal property in the taxing district in the bounds of

the road were levied and paid, for the full term of thirteen years.

By an amendment of said section 4812, April 17, 1886, 83 O. L., 85, the period for which a levy might be made for liquidating any indebtedness incurred on account of such road, was extended to ten years in addition to the eight years on petition, thus making in all eighteen years instead of thirteen years.

The tax complained of in the petition of the plaintiffs in error was levied under this last amendment of section 4812 adding five years to the period for which a levy of ten mills on the dollar might be made for the purpose of paying the outstanding bonds issued in the proceedings to construct said road.

Plaintiffs in error claim that the power of the commissioners at the time the road was constructed was limited to a levy of ten mills on the dollar for thirteen years, that the addition of five years making a total of eighteen years is retroactive, and that the said amendment of section 4812, when applied to the road in question, is in conflict with section 28 of article 2 of the constitution, which provides that, "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts."

In *Bowles v. State*, 37 Ohio St., 35, this court held, and we think correctly, that the levy under this one mile assessment law is a tax and not an assessment. Being a tax the general assembly derives its powers to levy the same from section one of article two of the constitution, which vests all legislative power in the general assembly. The power of taxation so vested in the general assembly is supreme except as limited by other provisions of the constitution, and the provision against the passage of retroactive laws,

and laws impairing the obligation of contracts, is, in a proper case, a limitation upon the taxing power.

Does the case at bar fall within that limitation? On the one hand it may be urged with much force that the property owners in this special tax district by their petition for the road set the machinery provided by the statute in motion, and caused the road to be constructed; that they retain the road and its benefits, and that they should pay the cost of the same upon the well recognized principle that statutes imposing taxes to pay a pre-existing debt are generally not retroactive. *Holtz v. Commissioners*, 41 Ohio St., 423; *State v. Cincinnati*, 52 Ohio St., 452; Cooley on Taxation, 291. And it might further be urged that section one of article two of the constitution giving the general assembly the power of taxation must be read into this one mile assessment law, and that the limitation therein to ten mills and thirteen years is subject to the power of the general assembly to change the same as well as other parts of the statute, and that while the county officers are restricted to the ten mills and thirteen years limitation, there is no restriction or limitation on the power of the general assembly to authorize sufficient taxation to pay the debt incurred in the construction of the road; and further that the bondholders should receive their money.

While these considerations have much force, we have concluded that they are insufficient to sustain the taxation in question. While it is true that section one of article two of the constitution must be read into the statute in question, it is equally true that it must be so read into the statute with the limitation against the passage of retroactive laws attached thereto. So that after all the question turns

upon the force and effect to be given to that provision of the constitution which says: "The general assembly shall have no power to pass retroactive laws." Article 2, section 28. This provision is in the nature of an estoppel. The general assembly having the power to enact laws, and on the one hand having failed to do so, and permitted persons to conduct their affairs with reference thereto, or on the other, having enacted laws with certain limitations, and persons having conformed their conduct and affairs to such state of the law, the general assembly is prohibited, estopped, from passing new laws to reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time.

Under the statute in question the general assembly enacted that an extra tax of ten mills and *no more*, should be levied for a period of thirteen years and *no longer*, and with that limitation in the statute the property owners petitioned, and set the machinery in motion for the double purpose of having the road constructed and paying the cost thereof, within the limitation provided in the statute. They relied upon that limitation so provided by the general assembly, and they were justified in so doing, because while the general assembly grants powers to the people, it limits the manner in which those powers shall be exercised, and such limitations are of as much force as the powers themselves. While everyone is liable to pay the general taxes to carry on the government, there is no such general liability to pay extra taxes, but such extra taxes can only be imposed in accordance with the particular statute authorizing them. The statute in question authorized a levy of ten mills each year for thirteen years and no longer, and to now impose this extra tax for a period of five

years beyond the thirteen, is imposing an additional burden upon the property owners in this taxing district, not assumed by them when they signed and presented their petition for the road, and which the general assembly assured them by the limitation in the statute, should never be imposed. This assurance the constitution required the general assembly to make good, and it therefore had no power to add this extension of five years to the thirteen as to the road in question, and the extra taxes imposed under that extension are unauthorized and void, and should be enjoined. The principle is the same as was held in *Cincinnati v. Seasongood*, 46 Ohio St., 296, to the effect that in street assessments, the statute in force at the time the improvement ordinance was passed, must govern.

This case is different from a case where the cost of a public improvement exceeds the fund provided by the statute, thus leaving an outstanding indebtedness, the statute having no limitation as to amount or time. In such cases the general assembly has power to levy a tax to pay such indebtedness. *Holtz v. Commissioners*, 41 Ohio St., 422.

But it is urged that the act of April 2, 1859, entitled "An act for the relief of the holders of orders issued by free turnpike road companies," 56 O. L., 121, and carried into the Revised Statutes as sections 4814 and 4815, authorizes the levy of the tax in question. Those sections at the time this road was constructed read as follows:

"4814. When the right of any free turnpike road company to levy special taxes to pay the orders issued by it has ceased, leaving outstanding orders unpaid, and their payment unprovided for, the commissioners of such road company shall immediately

make out and deliver to the auditor of the county in which such road or any part thereof is situate, a complete and perfect list of all such outstanding orders, for the payment of which they have no funds or means of payment, with a description of each order, as to date, amount, rate of interest, if any, and when payable, which shall be verified by said commissioners, and the county auditor shall lay the same before the county commissioners at their next regular session thereafter."

"4815. At any regular session of the county commissioners at which such list is laid before them, they shall immediately proceed to ascertain the aggregate amount of such orders, including interest, in case they draw interest, and adding thereto an amount sufficient to pay the expenses of assessment and collection, and to cause the same to be assessed upon the same lands and lots as were subject to taxation for the construction of the road, or to pay for the same, at the time when the right to tax such lands and lots ceased, according to their true value in money, as shown by their valuation contained in the county duplicate."

The "free turnpike road company" spoken of in said section 4814, is the "corporation" mentioned in section nine of the act of March 12, 1845, entitled "An act to provide for laying out and establishing free turnpike roads," 43 O. L., 106, Swan's Revised Statutes, 822; Curwen Revised Statutes, Chapter 605, page 1163; Curwen's laws, Chapter 316, page 764, S. & C. 1321, and carried into the various subsequent pike statutes, until it is now the "body corporate" as provided in section 4795, Revised Statutes. It seems clear that these sections are not applicable to the road in question. In the construction of free turn-

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piques under the said act of 1845, in aid of which said act of April 2, 1859, was passed, no bonds were issued, but as the work progressed orders were issued on the fund raised by said extra taxation. The statute could apply to any particular road for a period not exceeding ten years, and it often occurred that orders were outstanding at the end of the ten years and no fund to pay them, and the act of 1859 was passed to create a fund for the payment of such orders. It will be noticed that sections 4814 and 4815 authorize the levy of an assessment only for the payment of "orders;" nothing is provided for the payment of debts or bonds. To remedy this defect the general assembly amended the sections February 23, 1886, after this road was constructed, so as to make provision for the payment of "orders, bonds or other indebtedness," so that the general assembly has construed those sections as they stood when this road was constructed, as providing only for the payment of "orders." That such was the intention is still more clearly shown by the fact that section two of the act of March 27, 1857, 54 O. L., 42, was repealed and not re-enacted in the Revised Statutes. That section is as follows:

"Section 2. That whenever the commissioners on any free turnpike road shall have incurred a debt in the construction of the same, a part of which debt remains, or would remain, unpaid at the expiration of the charter for said road, the county commissioners may, if they are satisfied the road commissioners have acted honestly and in good faith in their expenditures on said road, continue or cause to be continued, such special taxes as were by the original act, or acts amendatory, authorized to be assessed for the construction of said road, until said indebtedness shall have been paid."

The "charter for said road" spoken of in the section was the ten years during which special taxes might be levied for the free turnpike, and as the limit was afterward extended to thirteen years under the one mile pike law, the charter would end at the close of that period, and if the general assembly had intended that the special taxes should be continued until all indebtedness should be paid, it would have carried the substance of this section into the Revised Statutes. There is another and perhaps stronger reason why these sections cannot apply to the road in question. The one mile pike statute, section 4786, requires the extra taxes to be levied on the real and personal property within the taxing district, and it is only by thus preserving the equality of taxation that the statute conforms to section two of article twelve of the constitution. *Bowles v. State*, 37 Ohio St., 35. So that funds to be raised by extra taxation for the payment of the outstanding indebtedness must be by equal taxation on all of the real and personal property in the extra taxing district. But section 4815 does not authorize an extra tax on the personal property in the district, but only on the "lands and lots." And as there must be equality of taxation on all the property, personal as well as real, and as the personal cannot be taxed, it follows that the real estate cannot be taxed. The doctrine of assessments cannot be applied, because assessments are only according to benefits, and this section requires that the amount be assessed upon the lands and lots, and no provision is made for the ascertaining of benefits; and moreover assessments according to benefits cannot be made on personal property. To apply section 4815 to the road in question would therefore render it unconstitutional.

The purchasers of bonds were bound by the limitations in the statutes, the same as if incorporated into the bonds, and were bound to take notice of the extent of the taxing district, and of the value of the property therein, and with those facts before them, they acted at their peril in so far as the property owners in this special taxing district are concerned; and if they made a mistake as to those facts, the loss should fall upon them, rather than upon the property owners who have paid taxes up to the full limit of the statute. The bonds should be paid, if possible within the provisions of the constitution, but the question as to the manner of raising a fund for that purpose is for the general assembly, and not for this court.

The motion to strike out the amendment to the petition raised the question of its sufficiency, and was in effect a demurrer, and it was error to sustain the motion because the amendment showed that bonds had been issued and sold, and aided in showing that sections 4814 and 4815 were not applicable to the case.

We therefore hold that sections 4814 and 4815 are not applicable to the case at bar, and that section 4812 extending the time for five years beyond the thirteen, is retroactive when applied to this case, and that the tax complained of in the petition is not warranted by any law, and should be enjoined. It was error to sustain the demurrer to the petition, and error to render judgment against the plaintiffs, and error for the circuit court to affirm the judgment.

Judgment reversed.

SHAUCK, C. J., and MINSHALL, WILLIAMS, SPEAR, and DAVIS, JJ., concur.

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Decision of state supervisor of election as to matters submitted to him by deputy supervisors is final—Error for court to order deputy to perform act contrary to decision of state supervisor—Attempt to compel deputy to print names of candidates on ballot by mandamus—State supervisor not proper party—Deputy state supervisors not a board or corporate body—Legal status of deputy.

1. The decision of the state supervisor of elections as to matters in controversy submitted to him by the deputy state supervisors, is final. It is the duty of such deputy state supervisors to obey such decision of the state supervisor of elections; and it is error for a court, by mandamus or otherwise, to order such deputy state supervisors to perform an act contrary to such decision of the state supervisor of elections.
2. In a proceeding in mandamus to compel the deputy state supervisors to print names of candidates for office upon the official ballot, the state supervisor is not a proper party. And such action cannot be maintained to compel the performance of an act contrary to the decision of the state supervisor in the premises.
3. The deputy state supervisors are not constituted a board, or corporate body by the statute, but each one acts simply as a deputy state supervisor, and in case of litigation the action should be against him in that capacity, and he may prosecute error, even though the others refuse to join with him.

(Decided January 22, 1901.)

ERROR to the circuit court of Warren county.

The action below was commenced on the 26th day of October, 1900, in the circuit court by the state of Ohio on the relation of Lon Hunter against the board of deputy state supervisors of elections for Warren county, Ohio, and Thomas C. Christie, George W. Snook, Charles W. Randall, and Charles H. Eulass as deputy state supervisors of elections for

said county of Warren, and Ed. S. Conklin as clerk of said board of deputy state supervisors of elections, defendants.

The petition, omitting the caption, signatures and exhibits, is as follows:

"On the 2nd day of June, A. D., 1900, the relator was duly nominated by a convention of electors representing the Democratic party of Warren county, Ohio, for the office of sheriff of said county of Warren, Ohio, and one L. R. Robertson was nominated for the office of clerk of courts of said county of Warren, Ohio, and one John W. Scull, Jr., was nominated for the office of infirmary director of said county of Warren, Ohio, to be voted for at the general election to be held on the 6th day of November, 1900.

"The plaintiff and said L. R. Robertson and John W. Scull, Jr., are residents and electors of Warren county, Ohio; and the Democratic party of the state of Ohio at the last preceding general election polled more than one per cent. of the entire vote cast in said state.

"At said convention the Democratic executive committee of said county, to-wit: W. W. Crane, Howard W. Ivins, Henry Reid, George W. Jack, M. V. Baldwin, Adam Bridge, and J. M. Earnhart were appointed a committee to represent said party, and duly authorized to fill vacancies in the ticket nominated by said convention.

"At said convention J. M. Earnhart was duly elected and acted as chairman of said convention, and Mary Proctor Wilson was duly elected and acted as the assistant secretary of the convention. On the 18th day of October, A. D., 1900, the said J. M. Earnhart as said chairman of said convention, and said Mary Proctor Wilson as assistant secretary of said

convention, made a certificate as required by law showing and certifying that said plaintiff and said L. R. Robertson and John W. Scull, Jr. had been duly nominated by said convention for the respective offices hereinbefore stated and that the persons hereinbefore named were authorized to represent said Democratic party in said county; which said certificate was duly verified by said J. M. Earnhart and Mary Proctor Wilson according to law; and said certificate was filed with said E. S. Conklin, the clerk of said board of deputy supervisors of elections for said county on the 18th day of October, 1900, at the hour of 1:45 o'clock P. M., of said day. A true copy of said certificate is hereto attached and filed herewith and is made a part hereof, marked 'Exhibit A.'

"On the 19th day of October, 1900, at 9:15 o'clock, A. M., W. W. Crane as chairman and Howard W. Ivins as secretary of the Democratic executive committee filed with said E. S. Conklin, the clerk of said board of deputy supervisors of elections for said county, a certificate as required by law in order to correct any insufficiency, imperfection or defect in said certificate herein before set out and to fill any vacancies that may have been caused by any such insufficiency, imperfection or defect in said certificate and the executive committee of the Democratic party of Warren county, O., made therein the following nominations: Lon Hunter, Lebanon, O., sheriff; L. R. Robertson, South Lebanon, O., clerk of courts; John W. Scull, Jr., Mason, O., infirmity director. A true copy of said certificate is hereto attached and filed herewith and is made a part hereof, marked 'Exhibit B.'

"On the said 19th day of October, 1900, and at 10:04 A. M., an objection to the first and second

certificates herein before set out was filed with E. S. Conklin, the clerk of said board of deputy supervisors of elections for said county. The only objection made being that said certificate was not filed not less than twenty days previous to the 6th day of November, 1900, the day of election. A true copy of said certificate is hereto attached and filed herewith and is made a part hereof, marked 'Exhibit C.'

"Said board of deputy supervisors of said county of Warren met October 20th, 1900, and on motion that the names on said Democratic ticket be printed on the official ballot, the votes of the board stood yeas two and nays two. On motion the proceedings of the board, together with all papers, were referred to the secretary of state. A true copy of said proceedings of said board is hereto attached and filed herewith and made a part hereof, marked 'Exhibit D.'

"On consideration the secretary of state held that the time provision of the statute for filing certificates is mandatory and that the certificate filed on the 18th day of October, 1900, as hereinbefore set forth was null and void and could not be corrected by a supplemental certificate, and directed said board of deputy supervisors of elections for Warren county, Ohio, that said ticket should not be placed on the official ballot. A copy of the holding of the secretary of state is hereto attached and filed herewith and is made a part hereof, marked 'Exhibit E.'

"The official ballot of Warren county has not been printed and there is yet ample time to place said Democratic ticket on the official ballot and to have the same printed, but the said board of deputy supervisors refuses to permit the same to be done.

"Wherefore the plaintiff prays that a writ of mandamus issue from this court commanding the defend-

ants, the board of deputy state supervisors of elections for Warren county, Ohio, to have the said Democratic ticket so as aforesaid nominated and certified to said board printed on the official ballot for said county for the next ensuing election on November 6, 1900, and for all other and proper relief."

To this petition the defendants filed the following demurrer:

"Now come the said defendants and demur to the petition of said relator for the following reasons, to-wit:

"1. The defendants are not proper parties to this suit, but the state supervisor of elections, Hon. Charles Kinney, is the proper party defendant to this suit.

"2. Said court has no jurisdiction of the subject-matter of said action.

"3. Said petition does not state facts sufficient to warrant the relief prayed for by relator."

The circuit court overruled the demurrer, to which exceptions were taken. The defendants not desiring to plead further, the court awarded a peremptory mandamus, at costs of defendants below, to which exceptions were taken. Thereupon a petition in error was filed in this court to reverse the judgment of the circuit court.

F. M. Cunningham; Frank Brandon and George A. Burr, for plaintiff in error.

1. The state supervisor of elections was a necessary party to the petition in the circuit court. Under the provisions of sections 2966-1 and following sections of the Revised Statutes of Ohio, the state supervisors of elections is vested with paramount authority over the election officers and elections in

Ohio. The members of the board of deputy state supervisors are appointed by him and may be removed by him. Section 2966-3, Revised Statutes; and they are therefore merely his agents in carrying out the powers and authority vested by law in the state supervisor. They were then engaged in carrying out his express order and command when the circuit court intervened and assumed to exercise authority which we maintain the law has vested in the state supervisor of elections alone. The deputy state supervisor of elections has plenary power over the appointment and removal of the deputy state supervisors of elections throughout the state, the preparation of the official ballot and the general conduct of the entire election. Therefore this case was prosecuted against the mere agents of the state supervisor of elections instead of the principal, the state supervisor of elections; and therefore there is a defect of parties defendant to the original petition.

2. Neither certificate of nomination was filed "not less than twenty days previous to the day of election" as required by section 2966-22, Revised Statutes. It is conceded by counsel for the Democrats that the original certificate was not filed in time; and therefore it is a nullity.

The statute is mandatory—"Certificates of nomination and nomination papers for the nomination of candidates for county officers shall be filed with the deputy state supervisors not less than twenty days previous to the day of election." *State v. Taylor*, 55 Ohio St., 385.

It is plain, therefore, that the certificate filed on the 18th day of October is absolutely a nullity and no nominations can be based upon it. Now can the Democrats bring themselves within the saving of

section 2966-24, Revised Statutes? It is manifest that they cannot. That section applies only in cases where the original certificate, filed in due time, is defective or imperfect, by reason of the causes set forth therein.

The names on these certificates were not entitled to be printed on the official ballot; because only such names shall be printed thereon as have been duly nominated according to the provisions of these sections. Section 2966-32, Revised Statutes.

3. The decision of the state supervisor of elections on the matter in dispute was final, and the circuit court had no jurisdiction of the subject matter of the petition. Section 2966-23, Revised Statutes. *Chapman v. Miller*, 52 Ohio St., 166; *Commissioners v. Johnson*, 21 Fla., 577.

W. C. Thompson; W. F. Eltzroth; John E. Smith and S. W. Probasco, for defendants.

First. Was the secretary of state a necessary party to the action, without whose presence in court a writ of mandamus could not issue?

We say not, because he has no duty to perform in reference to the printing of the ballots for election of county officers. In fact, he has nothing to do except to determine such questions in their jurisdiction as they cannot decide. Sections 2926-22, 23, 24, 26, 27, 28, 29, 30 and 31.

Second. Was the action of the secretary of state final, so as to deprive a court of general jurisdiction of jurisdiction to determine the legality of his action?

We hold not, because he has jurisdiction to determine only questions of fact, and those only as to whether there has a question been raised by objection. Revised Statutes, 2966-23. *State ex rel Fulton v. State, Sup'rs*, 9 C. D., 427; 17 C. C., 396.

There is no question of fact in the case, and there is no question as to the certificate, in form or otherwise.

It is simply a matter of the application of the law to the facts as they exist.

The fact that an objection was filed on account of the time of filing the certificate devolves upon the board or the secretary of state, no duty of determining any contest. It is their duty, under the law, to apply the law to the facts as they exist undisputed, even without any objection being filed with them. This duty is executive, and not judicial, and their acts cannot be final.

Third. Is the provision of the statute as to the time when the certificate is to be filed mandatory?

We answer no.

BURKET, J. Jurisdiction in mandamus is conferred upon the circuit court by section 6 of article 4 of the constitution, and that jurisdiction cannot be abridged or taken away by the general assembly.

Section 6741, Revised Statutes, is as follows: "Mandamus is a writ issued in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station."

The law as to mandamus at the time the constitution was adopted, was not broader than this section of our present statutes, and therefore we need not look further than to properly construe this section.

Section 6 of the Australian ballot law, 89 O. L., 434, provides that, "nominations to be valid must be certified as hereinafter provided." Section 9 of the same law, 93 O. L., 189, provides that, "certificates of nomination and nomination papers for the

nomination of candidates for county offices shall be filed with the deputy state supervisors not less than twenty days previous to the day of election." Section 10 of the same law, 90 O. L., 269, provides that, "the certificates of nomination and nomination papers being so filed, if in apparent conformity with the provisions of this act, shall be deemed to be valid, unless objection thereto is duly made in writing, within five days after the filing thereof. * * * Such objections or other questions arising in the course of nominations of candidates for county offices * * * shall be considered by the deputy state supervisors of the county, * * * and their decision shall be final; but in case no decision can be arrived at, the matter in controversy shall be submitted to the state supervisor of elections, who shall summarily decide the question thus submitted to him, and his decision shall be final."

In the case at bar objections to the certificates were filed within five days, and the deputy state supervisors of the county considered the same and failed to arrive at any decision, and they submitted the matter in controversy to the state supervisor of elections, and he decided that the certificates were filed too late, and that the names of the candidates should not be placed on the official ballot, and directed that they be omitted. As the statute provides that his decision shall be final, the decision so made by him became the law of the case, and absolved the deputy state supervisors from the duty of placing the names on the ballot, and after that decision the performance of the act of placing the names on the ballot was not enjoined by law "as a duty resulting from an office, trust or station."

The duty of the deputy state supervisors after that decision was to omit the names from the ballot, and it was error to order them by a writ of mandamus to perform an act which it was their duty under the statute not to perform.

The controlling principle—the finality of the decision of the state supervisor of elections—is the same in this case as in *Chapman v. Miller*, 52 Ohio St., 166. While the general assembly cannot curtail the jurisdiction of the circuit court in mandamus, it can so enact the law as to remove the duty to do any particular act, and when the duty no longer exists, the power of the court to command the performance of such supposed duty is gone.

As the decision of the state supervisor is final, the correctness of such decision cannot be reviewed or considered by a court, and therefore he is not a proper party to a proceeding to compel the deputy state supervisors, by mandamus or otherwise, to disregard such decision, or act contrary thereto. A court has no authority to compel such contrary action by the deputy state supervisors, nor to compel the state supervisor to change or modify his decision. He makes his decision to the best of his judgment and discretion, and such discretion cannot be controlled by a court. Section 6742, Revised Statutes.

The deputy state supervisors are not constituted a "board of deputy state supervisors" or corporate body by statute, and there is no provision for designating or suing them as such. The statute provides simply for the appointment of "deputy state supervisors," and they are known by that designation throughout the statute, and each one acts as such, and if sued, should be sued as such, and can prosecute error as such even though the others refuse to join in

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such error proceedings. In case of such refusal they should be made defendants.

The judgment of the circuit court will be reversed, the demurrer sustained, and the petition dismissed.

Judgment accordingly.

SHAUCK, C. J., and MINSHALL, WILLIAMS, SPEAR and DAVIS, JJ., concurred.

THE CITY OF ZANESVILLE v. THE ZANESVILLE TELEGRAPH AND TELEPHONE COMPANY.

Distribution of powers of state—Power conferred on court of justice—Effect of in determining its judicial character—Proceedings in a court of justice for the enforcement of a conferred right is exercise of judicial function—Status of municipal corporation as to proprietary interest in streets—Law as to compensation to keep streets in repair—Sections 3454, 3461-1, and 3471, Rev. Stat.—Construction of telephone lines in streets according to order of probate court—When municipal and company authorities fail to agree—Probate court has jurisdiction of proceedings instituted under section 3461, Rev. Stat.—Validity of provision—Constitutional law.

1. The distribution of the powers of the state, by the constitution, to the legislative, executive, and judicial departments, operates, by implication, as an inhibition against the imposition upon either, of those powers which distinctively belong to one of the other departments.
2. The fact that a power is conferred by statute on a court of justice, to be exercised by it in the first instance in a proceeding instituted therein, is, itself, of controlling importance as fixing the judicial character of the power, and is decisive in that respect unless it is reasonably certain that the power belongs exclusively to the legislative or executive department.
3. The institution and prosecution of a proceeding in a court, comprehends the filing of a proper complaint, process for bringing in the proper parties, and a judicial inquiry according to established rules and practice.

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4. Where the law confers a right, and authorizes an application to a court of justice for the enforcement of that right, the proceeding upon such application is the exercise of a judicial function, though the order or judgment authorized be of such a nature that it can only be performed, or its execution enforced, progressively during a future period.
5. A municipal corporation, though holding the title to its streets, has no private proprietary interest in them which entitles it to compensation when they are subjected to an authorized additional public burden by the construction of a telephone line therein. But being charged with the duty of keeping the streets under its control in repair, it may be allowed compensation to an amount sufficient to make the repairs rendered necessary by such additional use. It is not essential that provision be made for the assessment of such compensation by a jury.
6. Telephone companies organized under the laws of this state, have the right, by virtue of sections 3454, 3461-1, and 3471, of the Revised Statutes, to construct their lines along the streets and public ways of municipal corporations, in accordance with the order of the probate court made in pursuance of section 3461, directing in what mode the lines shall be so constructed when the municipal authorities and the company fail to agree, or the former unreasonably delay to enter into an agreement with the company.
7. The power to make such order, as provided in section 3461, is not inappropriately conferred on the probate court; and that court has complete jurisdiction of a proceeding instituted therein in conformity with that section. The provision is not obnoxious to the constitution of the state on the ground that the power it confers is distinctively legislative or administrative, but is constitutional and valid.

(Decided January 22, 1901.)

ERROR to the Circuit Court of Muskingum county.

ON REHEARING.

NOTE:—On the first hearing the judgment of the circuit court was reversed. The report of the case on that hearing appears in 63 Ohio St., 442. On the rehearing the judgment of reversal was set aside and

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judgment rendered affirming the circuit court in accordance with the following report of the case.—Reporter.

The Zanesville Telephone and Telegraph Company is a corporation organized under the Ohio statutes, and authorized, in the construction, operation, and maintenance of its lines, to use the public roads, streets, and ways, within the state, and to appropriate such private property as may be necessary for its purposes. Desiring to construct and operate telephone lines in the city of Zanesville, the company made application to the city council in order that an agreement might be arrived at in regard to the mode of constructing its lines in the streets and alleys of the city. The application was accompanied with a proposed ordinance, the adoption of which was requested, providing that the location of the company's poles and wires should be under the control of the council's committee on streets and alleys, and be so placed as not to interfere with the public travel; and, it contained provisions for protecting the city against damages arising from the construction and maintenance of the telephone lines. The council declined to accept the proposed agreement, and adopted an ordinance imposing different and more onerous conditions, among others, one requiring the company's wires to be placed under ground. The provisions of this ordinance were not satisfactory to the company. And, the negotiations having resulted in a disagreement, the company made its application, in the form of a petition, amendment thereto, and supplemental petition, to the probate court of Muskingum county, for an order, under section 3461 of the Revised Statutes, directing in what mode the company's line should be constructed along the streets and public

ways of the city. The city was made a party, was served with process, and filed an answer alleging that the company "never offered nor tendered to the said city, or to the said city council, any lawful ordinance or agreement in relation to the matter set out in the petition, or offered or attempted to enter into any lawful agreement in relation thereto." The case was heard on the pleadings, and evidence, on the 9th day of August, 1899, and, at the conclusion of the trial, as the record shows, the court held that section 3461, under favor of which the proceeding was had, was unconstitutional, and, on that ground, dismissed the proceeding at the cost of the company. That judgment, and its affirmance by the court of common pleas, were reversed by the circuit court, and the cause remanded for further proceedings. The case is here to obtain the reversal of the circuit court.

Charles G. Griffith, city solicitor, and *Durbin & McDermott*, for plaintiff in error.

J. W. Warrington, *W. M. Ampt*, and *Ellis G. Kinkead*, also filed briefs and argued against the constitutionality of the statute.

S. M. Winn and *A. J. Andrews*, for the defendant in error.

Foraker, *Outcalt*, *Granger & Prior*, also filed a brief, and argued in favor of the constitutionality of the statute.

As this case was thoroughly briefed when first reported, *Zanesville v. Tel. & Tel. Co.*, 63 Ohio St., 442, it is thought unnecessary to repeat briefs of counsel here, except to give the additional cases cited in those of *Warrington*, *Ampt & Kinkead*, and of *Foraker*, *Outcalt*, *Granger & Prior*, on this the rehearing of the case.

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From the brief filed on the rehearing by *Warrington*, *Ampt* and *Kinhead*, we insert the following:

The earliest discussion of the distribution of powers in our courts was in *Hayburn's case*, 2 Dall., 409.

The *Ferreira* case, cited in the original brief and in the opinion of this court, was followed by the Supreme Court of the United States in the case of *In re Sanborn*, 148 U. S., 224, where that court held that no appeal will go to the Supreme Court from the findings and decisions of the court of claims, such findings being non-judicial in their nature.

Upon the authority of the same case was decided *Ex parte Riebeling*, 70 Fed. Rep., 310, at pp. 314-15, where a statute was held unconstitutional which required a court to certify the value of informers' services in certain smuggling cases. Other cases to the same effect are: *Merrill v. Sherbourne*, 1 N. H., 203, (cited approvingly in *State v. Hawkins*, 44 Ohio St., 109); *Ex parte Schrader*, 33 Cal., 279; *O'Brien v. Montgomery*, 58 Mich., 364; *Shumway v. Bennett*, 29 Mich., 451; *Denny v. Matoon*, 2 Allen, 361; *State v. Noble*, 118 Ind., 352; *Munday v. Rahway*, 43 N. J. L., 338; *Auditor v. A. T. & S. F. Ry. Co.*, 6 Kas., 508; in this case the court held unconstitutional a statute delegating to a court the power of assessing property.

The cases cited in *Western Union Telegraph Co. v. Myatt*, are likewise all pertinent to this issue and sustain the decision already reached by this court. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362; *Railway Co. v. Gill*, 156 U. S., 649; *Cotting v. Stock Yards Co.*, 82 Fed. Rep., 845; *The Express Co. Cases*, 117 U. S. 1; *A. T. & S. F. Railway Co. v. Denver & N. C. Ry. Co.*, 110 U. S., 667; *Railway Co. v.*

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Wellman, 143 U. S., 339; *Interstate Commerce Commission v. C. N. O. & T. P. Ry. Co.*, 167 U. S., 499; *Forsyth v. City of Hammond et al.*, 71 Fed. Rep., 443.

From the brief of Foraker, Outcalt, Granger & Prior we insert the following: 6 Am. & Eng. Ency. Law, 1006; Ohio Const., Sec. 8, Art. 4; *State ex rel. v. Judges*, 21 Ohio St., 1; *Walker, Solicitor, v. Cincinnati*, 21 Ohio St., 14; *State v. Harmon*, 31 Ohio St., 250; *DeCamp v. Archibald*, 50 Ohio St., 618; *State ex rel. v. Cincinnati*, 52 Ohio St., 419; *In re Canada Northern Railway v. Bridge Co.*, 7 Fed. Rep., 653; *Williams v. Railway Co.*, 40 Atl. Rep., 925; *Callen v. Junction City*, 23 Pac. Rep., 652; *State v. Ensign*, 56 N. W. Rep., 1006; 1 Goebel (Ohio Probate), 317; *Wells v. McLaughlin*, 17 Ohio, 99; *Street Railway v. Cummins ville*, 14 Ohio St., 523; *Elster v. Springfield*, 49 Ohio St., 82; *Railroad Co. v. Elyria*, 7 Circ. Dec., 312; 14 C. C. Rep., 48; 2 Dillon, Sec., 683; Keasbey on Electric Wires, Sec. 34; *In re Stevens*, 83 Cal., 331; *State ex rel. v. Alling*, 12 Ohio, 16; *Ex parte Strang*, 21 Ohio St., 610; *Smith v. Lynch*, 29 Ohio St., 261; *State v. Smith*, 44 Ohio St., 348; *Kirker v. Cincinnati*, 48 Ohio St., 507; *County of Ralls v. Douglass*, 105 U. S., 728.

WILLIAMS, J. The judgment of reversal announced after the first hearing of this case, was not the unanimous decision of the court, although no dissent appeared. The case having been more fully argued on the rehearing, and further considered by the court, is now for disposition as upon the original submission. The only question that has engaged the attention of counsel and the court on each of the hearings, is whether that provision of section 3461

of the Revised Statutes, which confers jurisdiction on the probate court to direct the mode of constructing a telegraph or telephone line in the streets of a municipality when its authorities and the company are unable to agree, is repugnant to the constitution of the state; and the sole ground of the attack upon the constitutionality of the provision alluded to, is that the power it purports to confer on the court is purely legislative in character. It is a sound proposition that the distribution of the powers of the state, by the constitution, to the legislative, executive, and judicial departments, operates, by implication, as an inhibition against the imposition upon either, of those powers which distinctively belong to one of the other departments. But in classifying those powers and determining to which class various powers created by statute exclusively or properly belong, difficulties are encountered, and many nice distinctions have been made. If the power here in question is such that it can be conferred on any judicial tribunal, there can be no doubt of the capacity of the probate court to receive and exercise it, by virtue of the constitutional provision which enables that court to take any jurisdiction, in any county, which the legislature may confer upon it. Section 8, article 4. The statutory provisions which may aid in a determination of the nature of the power involved in this controversy, are those contained in sections 3454, 3461-1, 3471, and sections 3456, 3457, 3458, 3459 and 3461 of the Revised Statutes. These sections provide as follows:

Section 3454. "A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures,

including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road."

Section 3461-1. "Any person or persons may be and are hereby authorized to construct lines of electric telegraphs, from point to point, upon and along any of the public roads and highways, and across any of the waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines; provided, that the same shall not in any instance be so constructed as to incommode the public in the use of said roads or highways, or endanger or injuriously interrupt the navigation of said waters; nor shall this act be so construed as to authorize the erection of any bridge across any of the waters of this state."

Section 3471. "The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies."

Section 3456. "Any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or appropriation, or in virtue of any provision in its charter, for the purpose of making preliminary examinations and surveys, with a view to the location and erection of lines of magnetic telegraph, and may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its telegraph poles, piers, abutments, wires, and other necessary fixtures, and for stations, and the right of way

over such lands and adjacent lands sufficient to enable it to construct and repair its lines."

Section 3457. "No such company shall, without the consent of the owner thereof, in writing, enter a building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier, or abutment in any yard or inclosure within which an edifice is situate, nor, in cases not provided for in section *three thousand four hundred and sixty-one*, erect any telegraph pole, pier, abutment, wires, or other fixtures, so near to any edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment be overthrown, nor injure or destroy any fruit or ornamental trees."

Section 3458. "When lands sought to be appropriated for lines of magnetic telegraph are held by a corporation incorporated under any law of this state, whether held by purchase or in virtue of any appropriation authorized by its charter or by any law of this state, the right of the company to appropriate such lands shall be limited to such use of the same as shall not, in any material degree, interfere with the practical uses to which the company is authorized to put such lands under its charter; and no such company shall erect poles, piers, abutments, wires, or other necessary fixtures, in such close proximity to any other line of magnetic telegraph authorized by law to be constructed as to interfere mechanically with the practical working of such telegraph."

Section 3459. "The right of such company to use lands held by a railroad company, for the permanent structures of such telegraph, shall be limited to the land which lies within five feet of the outer limits of the right of way of the railroad company, where it is practicable to erect the line within those limits; when

the company seeks to appropriate lands that lie beyond those limits, its petition must set forth the facts showing that it is impracticable to erect such line within said limits, and designate, either by a survey and map, or by reference to monuments, or by other means of easy identification, the place or places where the company seeks to establish the line; the probate court shall, in all instances, determine, if it be controverted by the railroad company, whether the erection of the line at the place or places designated will, in any material degree, interfere with the practical uses to which such railroad company is authorized to put such land; and if the court is satisfied that it will so interfere, it shall reject the petition, or require the structure to be erected at such other place or places as the court shall direct; but nothing in this chapter shall be so construed as to authorize any company to appropriate the use of the track or rolling-stock of any railroad company for the purpose of transporting poles, materials, or the employes of such telegraph company, or for any other purpose whatever."

Section 3461. "When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the

same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness."

It may be observed, at the outset, that the effect of section 3471, is to place telephone companies on the same footing as telegraph companies, so that when the latter kind of company is mentioned in the other sections of the statute, the former is also included. And that, under sections 3454 and 3461-1, companies of either kind, when created, obtain from the state, franchises to construct and maintain their lines, from point to point, upon and along any public road or highway, and across any of the waters, within the state, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for sustaining the cords or wires for such lines, subject only to the limitation that the lines shall not be so constructed as to incommode the public in the use of the roads, and highways, or endanger or injuriously interrupt navigation. In order that such companies may fully enjoy the franchises thus granted them by the state, they are clothed, by section 3456, with the authority to appropriate any lands of individuals or corporations that are deemed necessary by the companies for the erection and maintenance of their poles, piers, abutments, wires, and other appliances, and the right of way over adjacent lands sufficient to enable them to construct and repair their lines. But this right of appropriation of private property for the use of such companies is subject to certain limitations prescribed in the subsequent sections, one of which, contained in section

3457, forbids the appropriation or use by such company, without the owner's consent, of any yard or enclosure within which an edifice is situated, or the erection of any pole or structure so near to any edifice as to occasion injury or risk of injury thereto, or so that it will injure or destroy any fruit or ornamental tree. Another limitation, which is contained in section 3458, restricts the right of the company in the appropriation of lands held by another corporation, to such use of the same as will not in any material degree interfere with the practical use which the other corporation is authorized by its charter to make of such lands; and, it forbids the construction of the company's line in such close proximity to another such line as to interfere, mechanically, with the practical working of the latter. By section 3459, a restriction is imposed on the right of appropriation of property held by railroad companies, to the effect that there shall not be taken for any permanent structure, any part of the railroad right of way that lies more than five feet from its outer limits, where it is practicable to construct the telephone or telegraph line within those bounds; and if it be claimed that is impracticable, the appropriation petition must state the facts showing it to be so. When the petition is controverted, the probate court is required, in all instances, to determine whether the line at the place proposed will, in any material degree, interfere with the practical uses which the railroad company is authorized to make of its right of way, and if satisfied it will so interfere, the court is empowered to reject the petition, or to require the telephone poles or structures to be erected at such other place or places as the court may direct. It may be well to notice here the nature of the power conferred on the probate

court by this provision of the statute; for it is obvious that it is not different in nature from the power conferred by section 3461. It is essential that the rights of the two corporations, each holding separate franchises from the state, with respect to the uses which each are claiming of the same property, should be so adjusted that both may be able to carry out the purposes of their creation, and neither defeated in their objects by the conduct of the other. To accomplish that result, some impartial tribunal must be clothed with the power to hear and determine, on proper application, what mode of use by each company of the same property will enable both companies to carry on their business without obstruction by the other. Where, it may be asked, could that power be more appropriately lodged than in the tribunal in which the appropriation proceeding is had? And, can it be any the less judicial in its nature because exercised by the court in the first instance, than it would be if resort were had to a court of equity to settle the dispute, after actual conflict between the two companies had arisen? If it is a judicial function to direct where the poles of a telephone line shall be placed in order to prevent interference with the proper use of a railway, it must be equally so to direct the mode of construction of the line in other respects so as to accomplish the same result, or so as to avoid unnecessary obstruction to the use of a public street. It may be said that the proceeding under this provision of the statute does not involve the exercise of any supervisory or administrative power belonging to municipal authorities. Neither does that under section 3461. That section makes provision for all further appropriation proceedings that are necessary to the complete enjoyment by the companies of their

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franchises, by authorizing the condemnation of the easements appurtenant to property abutting on the public streets and ways, the owners of which are entitled to compensation for the new burden. And then follows the provision in question, designed, evidently, to furnish a competent tribunal, and provide a method of procedure, for the adjustment of any controversy between the company and the municipal authorities in regard to the mode of constructing the companies' lines in the streets; that being the only remaining step necessary to enable the company to enter upon the full use of its franchises. The provision is that, "the mode of use" of the streets, "shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness." This is practically a provision for an appropriation proceeding against the municipality, and it is the only proceeding of that nature that is necessary against the municipal body in order to enable the company to make the needed uses of its streets. It will be noticed that it is not the right to use the streets that is made the subject of agreement between the company and the municipal authorities, or of determination by the

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court. That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality. It is only the *mode* of such use that becomes the subject of agreement or judicial determination. The power of eminent domain residing in the state, it has been held, under our present constitution, is committed to the control of the general assembly by the grant of legislative power, and it may be exercised by that body directly, or by agencies like private corporations, in such manner, under such conditions, and through such tribunals having capacity to receive the jurisdiction, as may be, by legislative enactment provided; subject, however, to the constitutional requirement that the property taken be for a public use, and to the constitutional guaranty of compensation for private property so taken. A municipal corporation, though holding the fee in its streets, has no private proprietary right or interest in them which entitles it to compensation, under the constitution, when they are subjected to an authorized additional burden of a public nature. Lewis on Eminent Domain, section 119. Being charged with a public duty only, with respect to the streets under its control, including that of keeping them in repair, the compensation it is allowed to demand or receive for the use of its streets by a telephone company is expressly limited, by the provision of the statute under consideration, to "what may be necessary to restore the pavement to its former state of usefulness," where it is disturbed in the construction of the company's lines. This compensation not being for any private property taken, may, without interfering with any constitutional restraint, be assessed by the court, without a

jury. Nor can there be any doubt that the use of property, and of highways, for the legitimate purposes of a telephone or telegraph company, is a public use within the purview of the constitution, nor, that the occupation of streets for those uses is consistent with their original design. Indeed such companies have become indispensable business and social agencies, which materially relieve the public highways from use by the ordinary methods of travel, thus contributing to their convenience and safety. The statute contemplates that if the mode of using the public ways of cities and villages by telephone companies were left entirely to agreement between the council and company, the franchise of the latter might be made unavailable by the refusal of the former to negotiate with the latter, or by *bona fide* disagreement of the parties, a contingency not unlikely to occur; and hence, the necessity for the provision of section 3461, now in question, by which jurisdiction is conferred on a competent court to determine the mode of such use by an order binding on both parties. Whether that provision be considered as strictly a part of the system established for making appropriations by such companies under the power of eminent domain, or as incidental and auxiliary thereto, it calls for the exercise of judicial functions of the same general nature.

The contention of those who contest the constitutionality of this statutory provision is, that the proceeding authorized by it, though not nominally so, is in reality, an appeal from the action of the municipal council, a purely legislative body, the purpose of which is to invoke the exercise of powers by the court, of the same legislative character as those that have been exercised by, and properly pertain to, the

council. This is an incorrect view of the statute. The proceeding is not an appeal from the council, either in substance or form. An appeal is the removal of a cause or matter from an inferior jurisdiction after its decision, to a superior jurisdiction for re-trial on its merits; and, a proceeding in a superior jurisdiction cannot, with any propriety, be called an appeal where the cause or matter involved was not before any inferior tribunal or body. No action of the council, nor any matter within its cognizance, is brought before the probate court, by the proceeding therein under the statute, for review or reconsideration. The council is given no power to direct in what mode the lines of a telephone company shall be constructed in the streets of the municipality. Its sole province is to come to an agreement with the company in regard to the mode of using the streets by the company. The making of such agreement between the parties is not involved in the proceeding instituted in the court, nor is its action in that regard in any way invoked. The jurisdiction conferred on the court is to determine the controversy between the disputant corporations, arising from their disagreement or failure to agree, by an order binding on both, directing in what mode the telephone lines shall be constructed in the streets and alleys, so as not to incommode the public in the use of the same. The method of calling this jurisdiction into exercise is not by appeal, and could not be so, for the reason already given, but, in the language of statute, is by an original "proceeding instituted for that purpose." The institution and prosecution of a legal proceeding in a court, plainly comprehends the filing of a proper complaint, process for bringing the necessary parties into court, and judicial inquiry ac-

According to the usual rules and practice of courts. And this fact, alone, of conferring on a judicial tribunal in the first instance the power to act in a given matter, is of controlling importance in giving judicial character to the nature of the power; though that is not necessarily a conclusive test, for if it were, the existence of a statute would establish its validity; but it is decisive, in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or executive department. This court, in *State v. Harmon*, 31 Ohio St., 250, 259, approved of that principle, as stated by Selden, J., in Cooper's case, 22 N. Y., 84, as follows: "The principle * * * obviously is, that where any power is conferred upon a court of justice, to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power. The legislature, by conferring any particular power upon a court, virtually declares that it considers it a power which may be most appropriately exercised under the modes and forms of judicial proceedings."

In this important feature our statute is the opposite of the Connecticut statute which was held unconstitutional by the Supreme Court of that state in the *Appeal of the Norwalk St. Ry. Co.*, decided July 13, 1897, and reported in the 69 Conn., 576, and in 37 Atlantic Rep., 1080, which is cited, and chiefly relied on by the plaintiff in error to sustain its position with respect to the invalidity of our statute. The statutory provisions considered in that case are embraced in two sections, one of which was passed in 1893, and the other in 1895. The former provides that when any

street railway company desires to lay its tracks, or any additional tracks, in the streets of any city, town, or borough, it shall make and submit a plan for laying its tracks, etc., to the mayor and common council of the city, the selectmen of the town, or warden or burgesses of the borough, who may adopt the same, or "make such modifications therein as they deem proper;" and, that "no such company shall construct such railway or lay additional tracks" in the streets of such city, town, or borough, except in accordance with a plan approved by such local authorities. The section contains the further provision, that "the refusal or neglect of any such local authority to notify said company of its decision (on the company's application, within a specified time) shall be deemed to be a refusal to approve and accept said plan as presented by said company." The section adopted in 1895, provides that, when the local authorities named in the former section, shall make or render any decision or order with respect to any matter relating to any street railway within their jurisdiction, the company may appeal therefrom to the superior court, or a judge thereof, "and said court or judge shall make such order in reference to said matter appealed from, as may by it or him be deemed equitable in the premises." Then follows the further provision that, whenever the local authorities named in the act of 1893, above referred to, shall thereunder, "be deemed to have refused to approve or accept any plan presented by any street railway company, said street railway company shall have a like right of appeal therefrom to said superior court or any judge thereof; and said court or judge shall have the same powers with reference to said plan and the acceptance or modification thereof that said municipal

authorities would have had under the provisions of said act, and may make all such orders with reference thereto as may be deemed equitable." Perhaps it may aid somewhat in arriving at a clearer understanding of the decision in the Connecticut case referred to, to notice here that the act of 1895 provides for appeals in two distinct classes of cases, and that the powers conferred on the court or judge by the respective appeals, are somewhat different. It first provides for appeals from any *order or decision made or rendered* by the municipal authorities, on the railway company's application, and the power conferred on the court or judge in *that class of cases* is simply to make such order in the matter so appealed from as the court or judge may deem equitable; then it makes separate provision for appeals from the *neglect or refusal* of the municipal authorities to act upon the application of the railway company within the required time, and, in cases of that kind it is provided that the court or judge "*shall have the same powers that the municipal authorities would have had*" under the statute of 1893. It is this last provision, and that alone, by which it was attempted to confer on the court or judge, *all the powers of the municipal council*, that, in the opinion of the Supreme Court of Connecticut, made the functions of the appellate court or judge so essentially and distinctively legislative as to render that provision invalid.

The other provisions of the statute, including that providing for appeals in the other class of cases, that is, from orders and decisions made and rendered by the council, in regard to which, as above shown, the statute does not purport to confer on the appellate court or judge the *powers* of the council, but limits the

jurisdiction to the making of such orders as shall be deemed equitable, were held valid, and an appeal of that kind sustained, in the *Central Railway & Electric Co's Appeal*, reported in 67 Conn., 197. This case was not overruled by the later case of the *Norwalk Co's Appeal*, *supra*, but was distinguished. In that part of the opinion in the last case which distinguishes the former one, the provision of the statute for appeals from orders and decisions of the municipal council, and the power thereby conferred on the court or judge, are referred to as follows: "The act of 1895, provided, among other things, that an aggrieved person might appeal from an order made by a municipal council in pursuance of the act of 1893; that such appeal should be by petition to the court, which should specifically state the portion of the order appealed from, and the reasons, and be served on the council, and that such appeal should be tried by the court, and appropriate judgment rendered." Then, the learned judge, after giving the reasons for sustaining that provision of the statute and the appeal taken under it in the former case, proceeds to state the difference in the provision in question authorizing appeals when there is a refusal of the council to act, and in the nature of the power it purports to confer on the appellate court or judge, as follows: "But the act of 1895 goes further, and contains an additional provision, which is not fairly susceptible of being construed as merely providing for a process to bring into action the judicial power of the court, and which, without any action by a municipal council other than a failure to act within a limited time, purports to transfer to the court all the powers conferred on municipal councils by the act of 1893. The

distinction between the two provisions of the act is *vital*." So that, the real ground of that decision, holding invalid the statutory provision there in question, is that its purpose was to transfer to the appellate tribunal, to be exercised by it, all the legislative and administrative powers of the municipal council over the subject-matter of the appeal. That principle has no application to our statute; for, as has been heretofore shown, the proceeding authorized by it is in no sense a substitution of the court for the municipal council, nor in the nature of an appeal from that body, nor does it transfer to the court, to be exercised by it, any power primarily conferred on that body, nor purport to do so. And, furthermore, whether the distinction made in the Connecticut case between the different provisions of the statute there considered be substantial or not, it is clear the proceeding under each provision is strictly an appeal, in the appropriate sense of that term, from a legislative body, on matters originally committed to it, which, of itself, is a feature of controlling influence in fixing the legislative character of the power conferred, and which is wholly lacking in our statute.

The reasonable limits of an opinion, already enlarged, will not permit a review of all the cases cited by counsel for the plaintiff in error. We have carefully examined them all, and find none of them more directly in point than the one just noticed, and none, we believe, are claimed to be so.

"It is certainly clear as a general rule," says Selden, J., in *Cooper's case, supra*, "that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature." It is competent for the state,

through its legislative department, to grant to telephone and telegraph companies organized under its authority, the right to construct their lines in the streets of municipalities, and in the present instance the grant was so made. The inability or failure of the council to come to an agreement with the company in regard to the mode of using the streets for that purpose, practically amounts to a denial of the company's right, the remedy for the enforcement of which is that provided by section 3461 of the Revised Statutes. The administration of that remedy does not involve the exercise of any continuing supervisory powers over the municipal, or telephone corporation, nor the adoption or execution of administrative regulations for the government of either, but consists of an order made by the court in the usual manner of legal proceedings, after a hearing of the allegations and evidence of parties who are brought before the court by proper process.

It is necessary, no doubt, to specify in the order, with reasonable certainty, the mode of construction of the company's lines so that they will not incommode the public in the use of the streets; and, it is true that an order of that nature can only be performed, or its execution enforced in the future. But, while orders of that description may be infrequent, they are not unknown to the courts. In *Pennsylvania v. The Wheeling Bridge Co.*, 13 How. (U. S.), 518, 626, the court, after the examination of plans submitted, and the hearing of expert and other evidence, entered its order directing the defendant to so change the construction of its bridge over the Ohio river, according to certain detailed plans and specifications therein set forth, as not to obstruct the navigation of the river. And other instances of like

orders and decrees of courts may be found in the books. The case of the *Canada Northern R'y v. International Bridge Co.*, 7 Fed. Rep., 653, was a proceeding in a federal court under an act of congress which "authorized the construction and maintenance of a bridge across the Niagara river by the International Bridge Company, and provided that 'all railway companies desiring to use said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the appurtenances thereto, under and upon such terms and conditions as shall be prescribed by the district court of the United States for the northern district of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree.' The Canada Southern Railway Company subsequently presented their petition under this act to the district court of the United States for the northern district of New York, and alleging that it had never been able to agree with the International Bridge Company upon the amount of compensation which it should pay for the use of such bridge, prayed the court to determine and prescribe the terms and conditions upon which it might use the said bridge, together with the machinery, fixtures and approaches." The jurisdiction of the court was called in question on the ground that the power which the statute attempted to confer on the court was legislative, and not judicial. But the court held, that: "A determination by a court, under the authority of a statutory enactment, in a case of disagreement, of the terms and conditions upon which a railway company should be entitled to the use of a bridge and its appurtenances, after hearing the allegations and proofs of the parties, is not an improper exercise of

the judicial functions; that it is no less the exercise of a judicial function to prescribe a rule of conduct, or protect the exercise of a right during a future period, than it is to determine whether the right has been invaded in the past; and that, when a statute refers the question of the conditions upon which an easement shall be enjoyed to a judicial tribunal for decision, after hearing the proofs and allegations of the parties, the implication is cogent that the decision shall proceed upon settled principles of law and equity, and not upon arbitrary discretion."

The necessity for the existence of some tribunal authorized to hear and determine disagreements between municipalities and telephone companies with respect to the mode of construction of the companies' lines in the public streets, is apparent, not only for the protection of the rights of the respective corporations, but also in the public interest, as conservative of peace and good order, and in securing to the public the full benefit of the service such companies are designed to afford, at those reasonable rates which always attend fair competition. And the best consideration we have been able to give this case has failed to satisfy us that the power conferred on the probate court by the statutory provision in question has been inappropriately bestowed. The argument to the contrary, thorough and able as it has been, at most has served to cast a doubt upon the validity of the provision, but that is not enough to justify the court in holding it unconstitutional. The judgment is therefore

Affirmed.

BURKET, SPEAR and DAVIS, JJ., concur.

SHAUCK, C. J., and MINSHALL, J., dissent.

FORD ET AL. v. THE CITY OF TOLEDO ET AL.

Assessments—Exemptions of property from assessments for sewers as provided in section 2380, Rev. Stat.—Applicable, where—“Local Drainage” defined—When sufficient to entitle land to exemption—Vacant lots receiving benefit from adjacent sewer subject to assessment, when.

1. Section 2380, of the Revised Statutes, and the exemptions of property from assessments for sewers as therein provided, are applicable where the assessment is levied for the construction of a main sewer in a city of the third grade of the first class.
2. The “local drainage” contemplated by that provision, is that which provides the lot or land with adequate drainage for the necessary and usual purposes of sewerage; and it is not enough, to entitle a lot or land to exemption from assessment, that it is provided with sufficient surface drainage, or does not need drainage of that kind.
3. Where the lot or land is in need of local drainage, it is not exempt because it is entirely unimproved, and there is no immediate need for such drainage. Vacant lots and lands may, and usually do receive a present special appreciable benefit from the construction of a sewer in proximity with, and accessible by them for sewerage purposes, sufficient to sustain an assessment made on the basis of benefits.

(Decided January 22, 1901.)

ERROR to the Circuit Court of Lucas county.

The action below was brought by the city of Toledo for the use of P. A. MacGahan, against Samuel A. Ford and others, to recover the amount of assessments levied on their lands for the construction of a main sewer in sewer district No. 26 in the city of Toledo. The averments of the petition showed that the proceedings for the establishment of the district, the location and construction of the sewer, and levying the assessments, were regular and in conformity with the statute. The mode adopted for making the

assessment was according to benefits to the property in the district, and the amount levied on the property of the defendants was apportioned by the committee on that basis. The defendants admitted by answer the regularity of the proceedings, but contested the plaintiff's claim on the ground that their lands were already provided with sufficient local drainage, and needed none that would be supplied by the sewer; and that their lands were not in any way benefited by the construction of the sewer. The common pleas court found for the defendants, and the cause was appealed from its judgment to the circuit court, which, upon final hearing, made a finding of facts as follows:

"1. That the city of Toledo is a municipal corporation duly organized and existing under the laws of Ohio as a city of the first class, third grade.

2. That the common council of the city of Toledo passed the necessary legislation providing for the construction of a main sewer in sewer district number twenty-six of the city of Toledo.

3. That said legislation so passed provided that the cost and expense of said main sewer, except that part in the street and alley intersections, should be levied and assessed upon the lots and lands bounding, fronting or abutting thereon, or benefited thereby in proportion to benefits the same might receive for local drainage, and the remainder of the cost and expense of constructing said sewer should be levied upon all the real property in main sewer district number twenty-six according to benefits.

4. That all right and interest in said assessment were for a valuable consideration sold and transferred to P. A. MacGahan and that he is the owner thereof.

5. That the real estate described in the petition consists of river bottom and highland. That the river bottom is traversed by Ottawa river and said lowland is thirty feet below the highland.

6. That said sewer is fifty-four inches inside diameter, and six hundred feet thereof is constructed across said low land so that forty-five inches of the inside diameter is above the level of said lowland.

7. That said real estate has been for more than thirty years last past and the greater part thereof was at the date of the construction of said sewer used exclusively for agricultural and pasturing purposes, and that there are no dwellings or other buildings located thereon, but a part thereof was and is platted as city lots.

8. That the highland is traversed by a natural ravine emptying into Ottawa river.

9. That all of said upland was so situated topographically at the time of the passage of the legislation for said sewer and at the time of the construction thereof, as to have, and it did have, sufficient natural drainage, and the natural or surface drainage of the lowland was not improved thereby.

10. That said real estate derived no benefit by reason of the construction of said sewer other than that resulting to property generally in said sewer district, from having the sewerage carried away to said river outlet, and the special local benefit that will result thereto whenever said lots or lands shall be built upon. Surface water from said lowlands can not be drained into said sewer as now situated.

11. That said sewer is not designated for local drainage to the said real estate or any part thereof, and lateral local sewers leading thereto must be constructed to make it available for surface drainage

or local sewage for any of said lots or lands, but it was designated and built and may be used as a main sewer to carry surface water and house drainage and sewage of all kinds from said sewer district to said outlet; and much of said district is built upon and needs such outlet for its sewage.

12. That said upland at the date of the passage of the legislation providing for the construction of, and at the date of the construction of said sewer, did not need local drainage to carry the surface water away, and had no immediate need of house drainage or other local drainage to dispose of any sewage originating on said lots or land. The same was and is true of the lowland excepting the fact that it needs local surface drainage, but the same is not afforded or improved by said sewer."

And on the facts so found the court held the assessments were valid, for the full amount, with interest and penalty; and gave judgment accordingly. Error is prosecuted here to reverse the judgment of the circuit court.

C. F. Watts and *H. A. Merrill*, for plaintiffs in error, cite the following authorities:

Wewell v. Cincinnati, 45 Ohio St., 407; *Toledo v. Railway Co.*, 2 Circ. Dec., 450, 4 C. C., 113; *Cincinnati v. Hess*, 10 Circ. Dec., 479, 9 C. C., 251 (affirmed 61 Ohio St., 638); *Hermann v. State*, 54 Ohio St., 506; *Stewart v. Palmer*, 74 N. Y., 189; *Chamberlain v. Cleveland*, 34 Ohio St., 551; *Blue v. Wentz*, 54 Ohio St., 247; *Cincinnati v. Batsche*, 52 Ohio St., 324; *Schroder v. Overman*, 61 Ohio St., 1; *Norwood v. Baker*, 172 U. S., 269; *Walsh v. Barron*, 61 Ohio St., 15.

P. A. MacGahan and Charles S. Northup, for defendants in error, cite the following authorities:

Toledo v. Ford, 11 Circ. Dec., 115, 20 C. C., 294; *Chamberlain v. Cleveland*, 34 Ohio St., 552; *Cincinnati v. Hess*, 10 Circ. Dec., 479, 19 C. C., 252 (affirmed 61 Ohio St., 638); *Wewell v. Cincinnati*, 45 Ohio St., 407.

WILLIAMS, J. The assessments are claimed to be invalid, because they are forbidden by section 2380, of the Revised Statutes, which provides that: "The assessment shall not exceed the sum that would, in the opinion of the council, be required to construct an ordinary street sewer, or drain, of sufficient capacity to drain or sewer such lots or lands; nor shall any lots or lands be assessed that do not need local drainage, or which are then provided therewith; and the excess of the costs over the assessment herein authorized, shall be paid out of the sewer fund of the corporation; or in cities of the third grade of the first class, if the council so determine, may be assessed, in addition to other taxes now authorized by law, on all the real property in the sewer district in which said sewer is or may be constructed according to benefits, * * * ." It is the contention of the plaintiffs, that the facts found show that their lands were already provided with all necessary drainage when the sewer was constructed, and therefore did not need that which the sewer was designed to supply; and that, the sewer furnished no drainage in addition to that with which the lands were already provided, and consequently they were in no way benefited thereby. That the section referred to is applicable to main sewers, is apparent from the context. The preceding section, (2379) re-

quires that, "the council shall provide for assessing the costs and expenses of constructing main sewers, upon the lots and lands bounding or abutting upon the streets, lands, alleys, highways, market spaces, public landings, and commons, in or along which the same shall pass, by the feet front, or according to the valuation of the same on the tax list, or according to benefits, as it shall determine." The limitations on the assessments authorized by that section are prescribed in section 2380. Provision is then made for assessments for local sewerage by section 2381.

Nor do any of the subsequent provisions of section 2380 remove, or affect, the exemptions authorized by that section, nor prescribe any different rule, or mode, or power of assessment for a main sewer in cities of the third grade of the first class, except in regard to the *excess* over the assessment authorized by the preceding clause of the section. In such cities, the council is authorized to levy such *excess* on all the real property of the sewer district according to benefits; but that is the extent to which power is given such city different from that which governs other municipalities in levying assessments for main sewers. We do not concur in that part of the opinion of the circuit court which seems to hold differently.

Only those lots and lands, however, embraced within the bounds which may be assessed for a main sewer, are exempt from such assessment under section 2380, that, in the language of the section, "do not need local drainage, or which are then provided therewith." When it is determined what constitutes local drainage, within the meaning of the statute, it becomes, in each case, a question of fact whether the lots or

lands involved need, or are provided with, drainage of that kind. It was held in *Wewell v. Cincinnati*, 45 Ohio St., 407, that, in order to give application to the exemption of the statute, it was not necessary the local drainage should be provided by municipal authority. If for any reason it exists, and is adequate, the statute applies. In that case a large sewer emptying into the river, ample for all local sewage of lands entitled to connect with it, had been constructed without municipal action, and that was held sufficient to exempt the lands so entitled to connect, from assessments for another sewer constructed by the city. The question here, however, is somewhat different. It is whether present sufficient surface drainage constitutes local drainage within the purview of the statute; or must it be such as provides the land with adequate drainage for the necessary and usual purposes of sewerage? We think it must be of the latter character to work an exemption of the land from assessment. There is no direct finding that the lands of the plaintiffs in error were provided with drainage of that kind, nor that they did not need such drainage. Certain probative facts are found which tend to establish the ultimate fact, but in our opinion they fall short of that result. As we interpret them they show that the lands were supplied with sufficient natural or surface drainage and did not need *immediate* house or local drainage to dispose of sewage originating on the lands, but that they would be benefited as other lands in the sewer district by having the sewage carried away, in addition to the local benefit when the lands are built upon. To authorize an assessment for sewer purposes, it is not necessary that the property should have immediate need for the use of the sewer. If so, vacant lots on im-

proved streets, adjacent to buildings would be exempt. And, the length of time the ground may probably remain vacant, only goes to the urgency of the need and the measure of the benefit. But, that vacant ground may and generally does receive a present special appreciable benefit from the construction of a sewer, on account of its proximity and accessibility for all sewerage purposes, is known to everyone conversant with the subject. The drainage of sewage into an open ravine in a city would be inimical to the public health, and can hardly be considered such local drainage as the statute contemplates. On account of the situation and condition of the lands of the plaintiffs in error this seems like an extreme case for assessment; but it purports to have been levied according to local and special benefits, and the presumption is that the committee acted upon sufficient information, and according to law. The burden is upon the plaintiffs in error to show that their lands did not need local drainage, or were provided therewith, to entitle them to claim exemption from the assessment. The findings of the circuit court do not so show, in our opinion. The judgment of a lower court should not be reversed, unless the error is manifest, and it is entitled to that construction of its record which is most favorable to the judgment.

Judgment affirmed.

SHAUCK, C. J., BURKET and SPEAR, JJ., concur.

MINSHALL and DAVIS, JJ., dissent.

FIRST NATIONAL BANK v. HAYES & SONS.

Court requested, by each party, to instruct jury in its favor—Court thereby clothed with function of jury—Verdict of jury, in such case, should not be set aside by reviewing court, when—Bank deposits forfeit money with county board at request of firm bidding on bonds—Mistake in instructions to bank—Knowledge of mistake by depositing bank—Burden of loss—Law of contracts—Agency.

1. Where, at the conclusion of the evidence in a case, each party requests the court to instruct the jury to render a verdict in his favor, the parties thereby clothe the court with the functions of a jury, and where the party whose request is denied, does not thereupon request to go to the jury upon the facts, the verdict so rendered should not be set aside by a reviewing court, unless clearly against the weight of the evidence.
2. A firm dealing in bonds at Cleveland, Ohio, requested a bank at Victoria, Texas, to deposit \$1,000 with a certain county board at that place, to protect the firm's bid on certain bonds, advertised for sale by the board. The bank complied with the request, but before doing so, had notice of such facts as would have informed an ordinarily prudent person that there was a mistake in the bid, and that the deposit would be of no avail to the firm. *Held*: That the loss if any should be borne by the bank.

(Decided January 22, 1901.)

ERROR to the circuit court of Cuyahoga county.

Dickey, Brewer & McGowan, for plaintiff in error.
Kline, Carr, Tolles & Goff, for defendants in error.

MINSHALL, J. The plaintiff below, The First National Bank of Victoria, Texas, brought suit against the defendants, Hayes & Sons, to recover \$1,000 it claimed to have deposited for them at their request, with the commissioners of Victoria county, Texas, to protect a bid that had been made by them for cer-

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tain bonds advertised for sale by the commissioners of that county; and \$25 for services.

The defendants answered, admitting the request, but averring that there was a mistake in their bid; it was for five per cent. bonds, when in fact they intended to bid for six per cent bonds, the only bonds the county had to sell or had offered to sell, the mistake having been made by the stenographer; and that the fact that such mistake had been made was known to the plaintiff at the time it made its deposit.

The case was tried to a jury, and at the close of the evidence on both sides, the plaintiff moved the court to instruct the jury to return a verdict in its favor, and the defendants made a like motion for a verdict in their favor. On consideration the court instructed the jury to return a verdict for the defendants, to which the plaintiff excepted, but did not request the court to submit the case to the jury for its determination on the evidence. The first question that arises is whether this was error, though there may have been some evidence tending to support the plaintiff's case. If no motion had been made by the plaintiff and there was any evidence tending to support its case, it would have had the undoubted right to have had the same submitted to the jury, and it would have been error in the court to direct a verdict for the defendants. Of this there can be no question. Here, however, both parties on the termination of the evidence in the case, made similar requests—the plaintiff for a verdict in its favor and the defendants for a verdict in their favor, both parties in this way voluntarily submitting the case to the court for its determination upon the evidence. In *Beuttell v. Magone*, 157 U. S., 154, where like request had been made, the Justice delivering the opinion says: "This was necessarily a

request that the court find the facts, and the parties are therefore concluded by the findings made by the court, upon which the resulting verdict was given." In *Thompson v. Simpson*, 128 N. Y., 270, where upon the conclusion of the evidence each party had asked the court to direct a verdict in his favor, and the court thereupon directed a verdict for the defendant, the court said: "The effect of a request by each party for a verdict in his favor clothed the court with the function of a jury, and it is well settled that in such case, where the party whose request is denied, does not thereupon request to go to the jury upon the facts, a verdict directed for either party stands as would the finding of a jury for the same party in the absence of any direction, and the review in this court is governed by the same rules as in ordinary cases rendered without direction."

The question seems new in this state, and is so possibly from the fact, that it will seldom happen, that at the close of the evidence each party will move the court for the direction of a verdict in his favor. But it seems conformable to reason that where it is done, each party must have intended to submit the case to the court for its finding upon the facts as well as the law; and when, as in this case, the party against whom the verdict is rendered does not ask to have the case submitted to the jury, he cannot be heard to say there was error, because there was some evidence tending to support the issue in his favor. In such case the finding of the jury, in accordance with the instruction of the court, should be given the same consideration as if it had been rendered without such instruction. See, also, the following cases: *Trustees v. Vail*, 151 N. Y., 463, 467; *Clason v. Baldwin*, 152 N. Y., 204; *Mascott v. Insurance Co.*, 69 Vt.,

116; *Mortgage Co. v. Elevator Co.*, 71 N. W., 130, 6 N. Dak., 407.

The question then presented by the record is, not whether there was any evidence to support the plaintiff's claim, but whether upon the evidence adduced, the finding should have been for the defendant. And the question must be determined as if the case had been submitted to the jury upon the issues joined, without a direction to return a verdict for the defendant; for it is in fact the finding of the court upon the evidence submitted to it by the act of the parties, that is to be reviewed, and not whether there was some evidence tending to support the plaintiff's claim; for, as already observed, the omission of the plaintiff, after the court had directed a verdict for the defendant, to ask it to submit the case to the jury, must be taken as a waiver of its right to have the jury pass upon the evidence. And it is more than probable that this was not a mere oversight, and that it was omitted for the reason, it is probable the jury would have rendered the same verdict the court had already directed on the motion of the plaintiff.

Was then the verdict rendered upon the instruction of the court so clearly against the weight of the evidence that it should be set aside and a new trial granted? We think not.

The real question at issue between the parties on the trial, was whether the plaintiff had deposited the \$1,000 with the county commissioners, with the knowledge of such facts as would have put a reasonably prudent person upon notice that there was a mistake in the bid of the defendants, and the deposit would be of no avail to them. It appears from the record that the county commissioners of Victoria county, Texas, had on May 17, 1895, authorized the

issue of \$71,000, six per cent. refunding bonds of the county; and had also advertised for bids on them to be received and opened at the office of the commissioners at 2:30 P. M., October 30, 1895. And that on the 29th of that month Hayes & Sons had submitted a bid by telegram, which reads as follows: "Will give hundred three premium and interest for seventy-one thousand five per cent. bonds." Signed "W. J. Hayes & Sons." By a mistake, either of the stenographer, or in the sending of the telegram, it was made to read five, instead of six per cent. bonds. At 3:37 on the afternoon of October 31 the plaintiff received a telegram from Hayes & Sons inquiring, "Who gets county bonds sold yesterday, if unsold protect our bid. Answer." After having gone to the office of the county judge, president of the board, and learned the facts, the plaintiff in reply sent Hayes & Sons the following telegram dated October 31, 1895: "Your bid three per cent. premium on Victoria county five per cent. bonds accepted. We deposit one thousand dollars forfeit for you." Signed by the cashier. Notice was also sent by the county judge to Hayes & Sons of the acceptance of their bid at 3:26 P. M. of the same day, requesting the deposit to be made, and statement of the time they would be ready "to consummate the deal." The deposit was made by the plaintiff on the following day, November 1; and some three hours after the plaintiff received a telegram from Hayes & Sons, dated the same day, saying "Telegram received. Hold deposit arrival our representative Monday." Evidently the plaintiff's telegram of the previous day to Hayes & Sons was the first notice they had of the mistake that had occurred in making the bid. The record, however, shows that the plaintiff before it had received any telegram from

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Hayes & Sons, knew the character of the bid—that it was for *five* instead of *six* per cent. bonds, and that the bonds for which bids had been requested were six per cent. bonds. This information the president of the bank had obtained at the commissioners' office on the 31 inst.; having been called there by them for the purpose of consultation as to the bids. After having returned to the bank, the telegram from Hayes & Sons inquiring as to the sale of the bonds, and if unsold to protect their bid, was received. Now under these circumstances, what should a reasonably prudent person, acting for another, have done? That there was a mistake was apparent. Either Hayes & Sons had made a mistake in the wording of their telegram or were under the impression that five per cent. bonds had been offered. But the bank knew that such bonds had not been offered and that a bid of five per cent. bonds could not be accepted. Under the circumstances Hayes & Sons were not bound by their bid to the commissioners. The minds of the parties had not met upon the same terms, so that there was no agreement between them. The commissioners could not accept, as they attempted to do, the bid of Hayes & Sons for five per cent. bonds, for they had no such bonds to sell; and could not by the statutes of the state (which are put in evidence), advertise or sell five per cent. bonds, until they had been properly registered, and approved by the attorney general, none of which things had been done at that time. It would therefore seem that when the plaintiff received the first telegram from the defendants it should have called their attention to the mistake, and awaited further instructions. Had it done so instead of at once making the deposit, all trouble would have been avoided. Instead, however, of so doing, it made the

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deposit when it knew, or ought to have known, that it would be of no avail to Hayes & Sons, and would be retained by the county officials as a forfeit.

It is also claimed by the attorneys of Hayes & Sons that the evidence tends to show that there was collusion between the bank and the county officials, and also, that the deposit was not made until after the receipt of the second telegram from Hayes & Sons. Whether there be sufficient grounds for these claims we need not inquire, as we think the record shows that the deposit was made under circumstances that should have caused a prudent agent to have awaited further advices from his principal before making it.

Judgment affirmed.

SHAUCK, C. J., WILLIAMS, BURKET, SPEAR and DAVIS, JJ., concur.

THE WESTERN UNION TELEGRAPH COMPANY v. SMITH.

Action by farm owner against telegraph company for cutting trees along highway—Oral license, not authorized by landlord, from tenant, acted upon in good faith by company—Will defeat or mitigate recovery of exemplary damages though not compensation—Law of damages.

In an action against a telegraph company by the owner of a farm for the wrongful cutting of shade trees growing along a highway which passes through it, an oral license from a tenant not authorized to give it, if acted upon in good faith, and the instructions of the company to its servants with respect to the manner of trimming trees along its line, if given in good faith, are competent to defeat or mitigate the recovery of exemplary damages, though not competent to prevent the recovery of full compensation.

(Decided January 22, 1901.)

ERROR to the Circuit Court of Clark county.

Smith brought suit in the court of common pleas to recover damages for injuries done to his shade trees

by the defendant. He alleged that he was the owner of a farm through which passes a public highway along which he had shade trees of much beauty. The company had wires along said highway and poles for their support; that in the growth of the trees their branches had reached the wires and interfered with their operation. Whereupon he authorized the company to trim the small branches of said trees each year, but only to such extent as might be necessary to prevent such interference. That in disregard of his rights and of the restriction placed by him upon said permission the company wrongfully and unnecessarily severed the tops of some of said trees and large limbs from others, thus destroying their beauty and usefulness as shade trees and unfavorably affecting their vitality. The material portion of the answer is a denial that the servants of the company had trimmed the trees unnecessarily or in excess of the permission given. On the trial the plaintiff offered evidence tending to establish the allegations of his petition. The company offered evidence to show not only that the injury was much less than that which the plaintiff claimed and less than the testimony of some of his witnesses tended to establish, but also that a tenant in charge of the farm had given the company's servants oral permission to trim the trees precisely as they were trimmed on this occasion. This evidence was admitted but the court instructed the jury: "If you find that the defendant's servants did not do more to said trees than the petitioner says he had permitted it to do from time to time, the plaintiff cannot recover even nominal damages from the defendant. But I charge you that any cutting of said trees beyond the extent of what he had so permitted, if you so find from the evidence, without the consent

of the plaintiff, would have been wrongful and would entitle him to recover at least nominal damages. And, the interest of said plaintiff in said trees being a property inhering in the land itself, such consent to cut and sever from said trees, limbs and branches in excess of that which he says he had given permission to do, would have to be in writing. No mere verbal permission to do such alleged excessive cutting would protect the defendant from liability for damages for such excessive cutting. * * * If you should find upon the said issues under the charge of the court and the evidence in favor of the plaintiff, he would be entitled to recover of the defendant actual or compensatory damages, the measure of which in a case where the trees injured, if you so find, have no substantial value as timber severed from the realty, is the difference between the value of the land before and after the injury consequent upon such injury. * * * I charge you further that if you find from the evidence and the charge of the court that the plaintiff is entitled to compensatory damages, you are at liberty to go further and find what the law denominates punitive damages under the following circumstances: If you find from the evidence that the defendant's agents in such cutting of said trees acted wantonly and recklessly and without regard to the rights of the plaintiff then you may add such punitive damages as you may deem proper not beyond the amount in all of \$5,000.00 (the amount sued for), and in such case you may take into consideration and allow as a part of compensatory damages, reasonable fees of counsel."

Evidence to show that the trees were trimmed on this occasion in the usual manner and only to the usual extent, and that the company's instructions to

its servants were to trim the trees so as to keep the wire clear for a year was offered by the defendant and rejected by the court. The jury returned a verdict in favor of the plaintiff for \$2,350. A motion for a new trial was overruled and judgment rendered for the amount of the verdict. The judgment was affirmed by the circuit court.

Oscar T. Martin and *Geo. H. Fearons*, for plaintiff in error.

The principle of exemplary damages or punishment in civil cases was for many years the subject of much discussion among the text writers. Many opposed it as a violation of constitutional right and conceded that it was dangerous and liable to abuse, but finally it has become the rule in most of the states. 1 Sutherland on Damages, page 722.

The first and most glaring error to be discussed is that instruction of the court which solemnly declared the law of the land to be, that a party by his agent could grant a verbal permit to the agent of another party to do a certain act, and when action is brought for the consequences of such act and exemplary damages claimed, the fact that such verbal permission was granted would be no protection to the defendant.

It is unquestionably true that plaintiff's interest in his trees was an interest in real estate. It is also true that a grant of an interest in real estate to be valid must be in writing. But the error consists in treating the permission to cut the trees as a grant, when it was in fact only a license. The defendant does not claim to have acquired of the plaintiff any property right in his trees, but only to have obtained a license to cut away limbs and branches. *Cook v.*

Stearns, 11 Mass., 533; *Thomas v. Sorrell*, Vaughn, 351.

A license may be oral and is revocable at the pleasure of the licensor, but revocation cannot affect the validity of the acts already done under the license. *Wheeler v. West*, 71 Cal., 126; *Murray v. Gibson*, 211 Ill. App., 488.

A plea of license does not bring in question the title to real estate. *Wheeler v. Powell*, 7 N. H., 515.

Licenses are not only valid when created by parol but are usually so created. *Texas Ry. v. Jarrell*, 60 Tex., 267; *Druse v. Wheeler*, 26 Mich., 189.

A parol license is an absolute defense against trespass for doing the act for which permission was given, if done before revocation. *Miller v. Auburn R. Co.*, 6 Hill N. Y., 61; *Huff v. McCauley*, 53 Pa. St., 206; *Cook v. Box & Lumber Co.*, 87 Ind., 531; *Williams v. Morrison*, 32 Fed. Rep., 177; *Sterling v. Warden*, 51 N. H., 217.

Parol licenses have even been held irrevocable when money has been expended under them, although the effect might result practically as vesting a permanent easement on land. Parol license to build a railway across one's land where money was expended in reliance therein was held irrevocable in *Campbell v. Railway Co.*, 110 Ind., 490; *Pierson v. Canal Co.*, 2 Disn., 100.

A license to enter upon the land of another and do a particular act or a series of acts, may be valid though not granted by deed or in writing. Such a license does not transfer any interest in land, although when granted for a valuable consideration and acted upon, it cannot be countermanded. *Claffin v. Carpenter*, 4 Met., 580; Chitty on Contracts, 300-2; Greenleaf on Evidence, 271.

In an action for trespass for cutting and removing timber, the defendant assumed that he had a license to do the acts complained of by virtue of a verbal contract for the sale of the trees cut and removed and that the contract had been executed. This was properly held to be a good plea in bar to the action. *Seleh v. Jones*, 28 Ind., 255.

But assuming that there must be consent in writing and that it was a statutory right, it was for the benefit of the owner of the land. It could therefore be waived by him, and if the issue is made upon such waiver or verbal permission, then it would be competent for defendant to show that such verbal permission had been granted.

Section 6871 make it a statutory duty for a miner to do certain specific things, supply timber for props, etc., in his mine, yet the Supreme Court has held that the contributory negligence of an employe, who was injured by the failure of the mine owner to supply the necessary timber for props, etc., and the contributory negligence of the miner would defeat a recovery. *Coal Co. v. Estievenard*, 53 Ohio St., 43; 28 Am. & Eng. Ency. Law, Title, Waiver, p. 535.

Sections 298 and 301 make it the duty of the operator of a coal mine to keep same free from coal gas and gives a cause of action for failure to comply with the statutory requirements. Yet held this did not abrogate the common law rule that one who contributes to cause an injury cannot recover. *Krause v. Morgan*, 53 Ohio St., 26.

By granting verbal permission to trim the trees the owner waived the right to have same only in writing and cannot now insist upon the legal obligation to make such grant only in writing.

The pertinency of the charge grows out of the facts of the asserted claim on the part of the defendant that the trees were a nuisance. Proof was offered tending to show it. The facts stated were attempted to be controverted, and the issue of fact was directly made between the witness Forgy, that the trees had a tendency to injure the roadway, and the witness Hill, who, in rebuttal, attempted to controvert the statement. The defendant, therefore, was entitled to an application of the law to that state of facts. *Embler v. Walker*, 51 Hun., 384; Gen. Dig., Vol 6, 996; *Hickey v. Railway Co.*, 96 Mich., 498.

When the plaintiff himself gives authority to enter upon his premises or into his house, he cannot, because the defendant exceeds or abuses his authority, convert that which was originally done under the sanction of his own license, into a trespass, but must seek some other form of remedy. 23 N. E., 79; *Dingley v. Buffman*, 57 Me., 379; *Smith v. Pierce*, 110 Mass., 35; Cooley on Torts, 306; 13 Am. & Eng. Ency. Law—License, 546.

One who enters by permission another's close is not liable for entering another's part of the close. *Richmond v. Fiske*, 160 Mass., 34; 35 N. E., 103; 110 Mass., 39.

The court had charged in stating the issues, that the defendant did not have any right in said highway by virtue of its charter under the laws of the United States paramount to said plaintiff, which would authorize it to cut and trim said trees of said plaintiff without his consent. This took out of the case the answer of the defendant as to its paramount right. *Williams v. Sprigg*, 6 Ohio St., 585

Use of track is notice of right of way. *Day v. Railroad Co.*, 41 Ohio St., 392.

Under the rebuttal presumptions are those intentions of the law which only hold good until disproved. Chamberlain's Best on Evidence, Sec. 314.

The presumed consideration of promissory notes is good until the contrary is shown. That an interrupted exercise of a right for a long period with the knowledge of those who have a right to object, and without such objections it would be presumed that there was a legal acquirement of such right. Chamberlain's Best on Evidence, Sec. 326; *Harriman v. Railway Co.*, 45 Ohio St., 11; *Goodin v. Canal Co.*, 18 Ohio St., 169; *Railway Co. v. Zinn*, 18 Ohio St., 417; *B. & O. Ry. Co. v. Railway Co.*, 1 Circ. Dec., 60, 1 C. C., 100.

Possession of land is evidence of title to be left to the jury. *Wendall v. Blanchard*, 2 N. H., 456.

Presumption arising from great lapse of time. *Carter v. Tinnicum Fishing Co.*, 77 Penn., 315.

Unmolested possession for thirty years authorizes the presumption of a grant. *Barclay v. Howell*, 31 U. S., 498.

A grant may be presumed from acts of use and occupation for ten years, accompanied by a claim of ownership. *Burdeck v. Heirely*, 23 Iowa, 511.

Nor did the court in its charge instruct the jury as to the market value being the measure of damages, but stated the rule to be the value of the land, so that with the permitted evidence and the court's charge, the jury could find any value. 14 Am. & Eng. Ency. Law., 467.

The wanton and reckless act which would justify punitive damages, is such that implies intentional wrong. 1 Sutherland Damages, 724; *Simpson v. McCaffery*, 13 Ohio, 509.

Little & Spencer and Edward S. Houck, for defendant in error.

There was no evidence in the case tending to show permission to trim the trees, and there is no claim that there was written permission. *Daily v. State*, 51 Ohio St., 348; Sec. 3457, Rev. Stat.

As to exemplary damage the charge of the court is fully supported by *Roberts v. Mason*, 10 Ohio St., 277; *Railway Co. v. Slusser*, 19 Ohio St., 157; *Railway Co. v. Dunn*, 19 Ohio St., 162.

The measure of damages on account of injury to or destruction of trees depends upon their character and purpose. Thus where they have an intrinsic value separate from and not dependent upon the soil, the measure may be their value severed from the land. It is otherwise where their utility wholly or partly depends upon their attachment to and growth in the soil. Such are fruit, ornamental and shade trees. The measure of damages with respect to these, under the authorities, is that given by the court in its charge. Counsel seem to object to it as erroneous. *Evans v. Keystate Gas Co.*, 148 N. Y., 112.

The court follows its former holding in *Dwight v. Railroad Co.*, 132 N. Y., 199, where the whole subject is elaborately discussed in the light of the authorities, and identically the same rule announced. It is recognized in the following cases and seems to be the settled law: *Carner v. Railway Co.*, 43 Minn., 375; *Hoye v. Railway Co.*, 46 Minn., 269; *United States v. Taylor*, 35 Fed., 484; *Nixon v. Stillwell*, 52 Hun., 353; *Montgomery v. Locke*, 72 Cal., 75; *Mitchell v. Billingsley*, 17 Ala., 391; *Wallace v. Goodall*, 18 N. H., 430; *Kolb v. Bankead*, 18 Tex., 228; *Longfellow v. Quinsley*, 33 Me., 457; *Bennett v. Thompson*, 13

Ired. (N. C.), 149; *Hoyt v. Telephone Co.*, 60 Conn., 385; *White v. Stoner*, 18 (Mo.), App., 540; *Shaw v. H. & St. L. J. Co.*, 54 (Mo.) App., 223; *Graves v. Shattuck*, 35 N. H., 257; *Karst v. Railroad Co.*, 22 Minn., 118; *Muldrow v. Railroad Co.*, 62 (Mo.) App., 431; *Toledo v. Grassner*, 6 C. D., 782, 12 C. C., 520; *Befay v. Wheeler*, 84 Wis., 135.

It must be borne in mind that the value of the land was not the single thing sought. It was the *difference* in values before and after the injuries. If a distinction exists between the "value" of land and its "market value," it is hardly conceivable that the difference between the *values* before and after the injury would vary from the difference between the *market values* before and after such injury.

SHAUCK, C. J. The trial of the case was unnecessarily prolonged and the record expanded by introducing the opinions of witnesses whose information did not exceed that of the jury. In other respects there appears to have intervened no error which substantially affected the recovery of compensatory damages, unless they exceeded the amount shown by the evidence. The instruction that oral permission beyond that given by the plaintiff in person, and admitted in his petition, would not avail the defendant, though indicating an incorrect view of the law, did not operate prejudicially in so far as a recovery of actual damages was had. The undisputed evidence shows that the tenant from whom such further permission was said to have been received was without authority to give it. A license, whether written or oral, if given by an unauthorized person, would not defeat a recovery by the owner of damages actually sustained.

But the instructions given permitted the jury to award exemplary damages and the amount recovered suggests that damages of that character entered into the verdict. A consideration of the rules with respect to such damages is required by the fact that the instructions permitted their recovery, the record not showing affirmatively that they were not included in the verdict. Such damages being punitive in their nature are an exception to the general rules that in private actions the injured party is to be made whole, and that acts deemed worthy of punishment are prosecuted by the state. With respect to the recovery of damages of that character in private actions the different states have not adopted a uniform rule. The requisites to their recovery in this state were described in *Simpson v. McCaffrey*, 13 Ohio, 522: "The principle of permitting damages in certain cases, to go beyond naked compensation, is for example, and the punishment of the guilty party for the wicked, corrupt and malignant motive and design, which prompted him to the wrongful act. A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no such abuse of power, nor excuses such act; yet, in morals, and the eye of the law, there is a vast difference between the criminality of a person acting mistakenly from a worthy motive, and one committing the same act from a wanton and malignant spirit, and with a corrupt and wicked design. Hence where a jury are called upon to give smart money, or damages beyond compensation, to punish the party guilty of the wrongful act, any evidence which would show this difference, or rather all the facts and circumstances which tend to explain or disclose the motives and design of the party committing

the wrongful act, are evidence which should go to the jury for their due consideration." [That "a corporation may be subjected to exemplary or punitive damages for tortious acts of its agents or servants done within the scope of their employment, in all cases where natural persons, acting for themselves, if guilty of like tortious acts, would be liable for such damages," was held in the *Atlantic and Great Western Railway Company v. Dunn*, 19 Ohio St., 162. Although the case was decided by a divided court, it established the law upon the subject for this state. But since in cases of this character the punishment may not fall upon the actual wrongdoer, they present reasons why great care should be taken that such damages are not imposed unless all the conditions for their recovery are present. To show that they were not present in this case an oral license from an unauthorized tenant in charge of the farm, if acted upon in good faith, as well as the instructions of the company to its servants, if given in good faith, were available. While the evidence offered by the plaintiff below tended to establish all that is necessary to a recovery of full compensation, there is little evidence of such motive as would justify a recovery of punitive damages. The court should have admitted all the evidence offered to show the absence of such motive, or it should have instructed the jury that only compensation should be awarded.]

Judgments reversed.

MINSHALL, WILLIAMS, BURKET, SPEAR and DAVIS,
JJ., concur.

OLENDORF v. THE STATE OF OHIO.

Requirement in indictments of words "against the peace and dignity of the state of Ohio."

The constitution requires that all indictments shall conclude with the words "against the peace and dignity of the state of Ohio," but those words are not required to be at the conclusion of each count of an indictment.

(Decided January 22, 1901.)

ERROR to the Circuit Court of Franklin county.

The plaintiff in error was indicted in Franklin county for the crime of rape upon a girl of nine years. The indictment was in three counts, the first charging rape with her consent, the second rape against her will, and the third assault with intent to rape. The defendant made a motion to quash, and that being overruled, he filed a general demurrer, and that being overruled he entered a plea of not guilty. The case was tried upon the second and third counts, and he was found guilty on the second count and duly sentenced. The circuit court affirmed the judgment, and thereupon he filed his petition in error in this court, seeking to reverse the judgments below.

Rankin & Rector, for plaintiff in error.

1. The second count of the indictment, upon which the verdict of guilty rested, is fatally defective, and the court erred in overruling a demurrer to this count.

a. The second count does not close with the words "against the peace and dignity of the state of Ohio." Article 4, Sec. 20, of the constitution of Ohio.

We find no reported case in Ohio directly decisive of the question. The question was raised in *Ridenour*

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v. *State*, 38 Ohio St., 272, but not decided. The opinion, we believe, indicates that the court, had the question been decided, would have held as we insist the law is. At least the court did not intimate that *Davis v. State*, 19 Ohio St., 270, relied on the defendant in error, is any precedent.

There can be no doubt, after a review of the authorities given below, that *each count* of the indictment must conclude with the words required by the constitution.

We beg the court to examine the following authorities, as directly in point and as conclusive: Constitution of Ohio, Art. 4, Sec. 20; *Cox v. State*, 34 Am. Rep., 746; *Haun v. State*, 44 Am. Rep., 707; *State v. Soule*, 20 Me., 19; *State v. Pemberton*, 30 Mo., 376; *State v. Clevenger*, 25 Mo. Appeals, 655; Constitution of Mo., Art. 6, Sec. 38; *State v. Lapez*, 19 Mo., 254; *Early v. Commonwealth*, 86 Va., 921; *Commonwealth v. Carney*, 4 Grattan (Va.), 546; *Thompson v. Commonwealth*, 20 Gratt. (Va.), 724; *Williams v. State*, 47 Ark., 230; *State v. McClung*, 35 W. Va., 28 Bishop's New Criminal Procedure, Vol. 1, p. 384, Sec. 649; page 386, Sec. 652; *State v. Strickland*, 10 S. C., 191.

b. Venue is not alleged in the second count.

Venue is an essential element of the crime charged.

The said count alleges that John Olendorf, late of said county (we merely infer that Franklin county is meant), unlawfully made an assault and *then and there* ravished and carnally knew Annie Cloman. The words "then and there" are not sufficient to lay the venue in Franklin county. They do not and cannot be said to refer, with sufficient definiteness, to Franklin county, simply because it is alleged that the defendant is late of Franklin county. He might have

been late of Hamilton county, but in no way would that affect the place of the commission of the crime charged. *Knight v. State*, 54 Ohio St., 365.

For a valuable discussion of the law as we claim it, see 10 Am. and Eng. Ency. Law, pp. 566-567; *State v. Johnson*, 23 S. E., 619.

c. The second count does not allege the age of the defendant. *Hiltabiddle v. State*, 35 Ohio St., 52.

Edward L. Taylor, Jr., prosecuting attorney; *Augustus T. Seymour*, and *Karl T. Webber*, for defendant in error.

1. Is the second count of the indictment fatally defective?

(a) The first defect in the second count in the indictment relied upon by the defendant in error as a ground for reversing the judgment of the circuit court, is that said count in said indictment does not conclude with the words, "against the peace and dignity of the state of Ohio."

Section 20, Art. 4 of the constitution of the state of Ohio, is invoked against this count of the indictment. The indictment in this case does conclude with the words, "against the peace and dignity of the state of Ohio," as required by said section of the constitution. And every provision of the constitution in this case has been complied with.

What reason can there be why the court should enlarge upon the provisions of the constitution and read into said section the words, "Count of the indictment" in the place of the word "indictment?" If the framers of the constitution intended that each count of the indictment should conclude in the language "against the peace and dignity of the state of Ohio," that language would have been used in the construc-

tion of the constitution. And in the absence of the requirement that each count should conclude as contended by plaintiff in error, we can see no reason why the court should so construe that section of the constitution as to make this requirement. *Davis v. State*, 19 Ohio St., 270; *Nicholas v. State*, 35 Wis., 308; *McGuire v. State*, 37 Ala., 161; *Rice v. State*, 3 Heisk. (Tenn.), 215; *State v. Lea*, 1 Cold., 175; *Stebbins v. State*, 31 Tex. Crim. Rep., 294; *State v. Travis*, 39 La. Ann., 356.

(b) It is objected by the plaintiff in error that the second count of the indictment did not properly lay the venue of the crime.

Section 7215, Rev. Stat. of Ohio, the statute of jeofails provides, among other things, that "no indictment shall be deemed invalid, nor shall the trial, judgment or other proceeding be stayed, arrested, or in any manner affected, * * * for the want of an allegation of the time or place of any material fact when the time and place have once been stated in the indictment." *Evans v. State*, 24 Ohio St., 208; *State v. S. A. L.*, 77 Wis., 467.

(c) The third objection to the second count of the indictment is that the age of the defendant is not alleged therein.

Under Sec. 6816, Rev. Stat. Ohio, it is necessary to allege the age of the defendant when he has abused a female person with her consent, but it is not necessary when the charge is that the rape was against her will. 1 Wharton Crim. Law, Sec. 572.

BY THE COURT:

The indictment after the third count concludes with the words, "Contrary to the statute in such case made and provided and against the peace and dignity of

the state of Ohio," but the second count in and of itself does not contain said words, and this omission is claimed to be error, and is the only ground of error deemed worthy of report in this case.

Section 20 of article 4 of the constitution is as follows: "The style of all process shall be, 'The state of Ohio; all prosecutions shall be carried on in the name and by the authority of the state of Ohio; and all indictments shall conclude, against the peace and dignity of the state of Ohio.'"

The requirement is that the indictment shall conclude with the words "against the peace and dignity of the state of Ohio," and not that each count shall so conclude, and there is no statute requiring that each count shall have such conclusion, and it is therefore not necessary.

The words "against the peace and dignity of the state of Ohio," at the conclusion of an indictment, mean that the whole indictment, and each count thereof, is "against the peace and dignity of the state of Ohio." We find no error in the record.

Judgment affirmed.

SHAUCK, C. J., MINSHALL, WILLIAMS, BURKET, SPEAR and DAVIS, JJ., concurred.

**PRATT v. WALWORTH, WILLIAM C. SMITH AND WILL-
BERT L. SMITH, PARTNERS DOING BUSINESS
AS THE SMITH PREMIER TYPE-
WRITER COMPANY.**

*Plaintiff in error—Joined as defendant in error—Resorts to cross-
petition—Must file brief, when—Supreme Court practice.*

Where one who would properly be a plaintiff in error is joined as a defendant in error and seeks by a cross-petition in error to accomplish the same purpose that is sought by the petition in error he is amenable to the rule which requires that his brief must be filed within five months of the filing of the petition in error.

(Decided January 22, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

On motion to reinstate.

Pratt brought suit in the common pleas court against Walworth, alleging that he and one Payne had been partners in business, and that upon their dissolution Walworth executed to him, Pratt, a written undertaking to indemnify him against all liability on account of the indebtedness of said firm to L. C. and W. L. Smith, partners as the Smith Premier Typewriter Company. That said obligation not having been discharged, the typewriter company recovered a judgment against Payne and Pratt for the amount thereof with interest. And the petition prayed for a judgment against Walworth for the amount of the judgment and costs. The Smiths as such partners filed an answer and cross-petition, but on motion of Walworth it was stricken from the files. Walworth having interposed an answer to Pratt's petition, a final judgment was on the trial rendered in favor of

Walworth. That judgment was affirmed by the circuit court. Pratt filed a petition in error here for the reversal of the judgments of the circuit and common pleas courts, joining the Smiths as defendants in error. They filed what they styled a cross-petition in error praying for the reversal of the same judgment. No brief having been filed within five months after the filing of the petition in error as required by rule 2 of this court, the case was dismissed for want of preparation. The Smiths now move to reinstate.

C. A. Neff, for plaintiff in error.

Gilbert & Hills and *Carpenter & Young*, for defendants in error.

BY THE COURT:

The petition in error here filed by L. C. and W. L. Smith is not properly styled a cross-petition in error. There was no judgment below in favor of Pratt. The judgment rendered was entire and wholly in favor of Walworth; and what is styled a cross-petition in error was in fact a petition in error by which the Smiths sought precisely the same remedy that was sought by Pratt, and the relief which they seek is in Pratt's right. Inasmuch as they relied upon Pratt's petition in error and upon his counsel to comply with the rule, the case affords no ground for reinstatement.

Motion overruled.

ALL CONCUR.

SLOANE v. CLAUSS.

Defense to action before justice of peace—Involving equitable relief—Including injunction against disposal of family heirlooms—Such equitable relief may be granted by court of competent jurisdiction—Action before justice of peace may be restrained by injunction—Equitable relief—Injunction.

When a full and adequate defense to an action for the recovery of money only, before a justice of the peace, involves equitable relief, including an injunction against the disposal of family relics and heirlooms, the loss of which could not be compensated in damages, the redemption of the property pledged or mortgaged and such discovery and accounting as may be necessary to determine the actual amount due between the parties, such equitable relief may be granted in a separate action in a court of competent jurisdiction and the prosecution of the action at law before the justice of the peace may be restrained by injunction.

(Decided February 5, 1901.)

ERROR to the Superior Court of Cincinnati.

The defendant, Emil Clauss, brought a suit against the plaintiff in error before a justice of the peace, for the sum of \$86.50 and interest thereon alleged to be due on three promissory notes. The plaintiff responded to this by filing the petition in this case in the superior court, and obtained thereby a temporary injunction against the prosecution of the case before the justice and against the disposal of property of the plaintiff held in pawn by Clauss. After an amended petition had been filed, the superior court, on motion by the defendant, dissolved the temporary injunction. The superior court in general term affirmed the judgment dissolving the injunction; and the plaintiff in error now seeks to reverse the judgment of the superior court in special and general term.

In substance the amended petition sets out the following facts: That the plaintiff and the defendant as a pawnbroker had within three years preceding the filing of the petition mutual running accounts, the plaintiff receiving in small amounts, at different times, \$166 and pawning and pledging with defendant, at different times various articles of wearing apparel and jewelry; and that to the best of her knowledge she had repaid him more than \$113, interest and principal, the interest being at unlawful rates. That plaintiff pawned to defendant a sealskin coat worth \$250, and paid him \$50 as the same became due as he claimed; but when she failed for two weeks to make the last regular payment demanded by him, he refused to accept when tendered, the amount owing by her in redemption of the sealskin coat, and as the plaintiff is informed sold the coat and converted all of the proceeds to his own use. That she pawned with defendant a diamond stud worth \$100 which she afterwards redeemed, a gold ring worth \$10, a watch worth \$150, a watch worth \$30, a gift from her father, all of which are in his possession. As a further security for said loans she mortgaged to defendant a folding bed worth \$45, a combination secretary worth \$50, but which is an heirloom in plaintiff's family, two vases worth \$150, with decorations by plaintiff's deceased sister, and various other articles of the value of \$235. That the defendant threatens to sell and dispose of the mortgaged articles together with the pawned articles, which if done would be an irreparable loss to her, the said articles being her necessary household furniture and wearing apparel, and some of them being priceless to her, for the loss of which she could not be compensated in damages. That on the second day of May, 1899, plaintiff tendered to de-

defendant all the money he had before that time claimed on said mortgage, which he refused to receive, and that on the following day he instituted the suit before the justice of the peace, and plaintiff avers that the notes for which plaintiff is sued are forgeries, and that she is unable to state the true condition of accounts existing between her and the defendant, and an account will be necessary to ascertain the same. That, instigated by the defendant as plaintiff believes and charges, two individuals have sought entrance into her home, being unable to give warrant or authority therefor when demanded, charging plaintiff with removal of what he termed "Clauss' furniture." That defendant's license as a pawnbroker has been revoked because of illegal and dishonest practices, that he is not the owner of realty, is taxed on \$600 personalty and that he is a married man.

The prayer of the petition is for an accounting; for an injunction against the prosecution of the action before the justice of the peace; for cancellation of the notes and the chattel mortgage; that plaintiff may be allowed to redeem all the property so pawned and mortgaged; that defendant be restrained from selling or disposing of the pawns now held by him; and that upon the accounting the plaintiff recover of the defendant the amount which may be found to be due her.

David Stuart Hounshell, for plaintiff in error.

Maxwell on Code Pleading, p. 501; Jones on Pledges, Sec. 559; *Brown v. Runals*, 14 Wis., 755; *White M. R. R. v. Iron Company*, 50 N. H., 57; *Merrill v. Houghton*, 51 N. H., 61; *Hart v. Peneyck*, 2 Johns Ch., 62; *Blodgett v. Blodgett*, 48 Vermont, 32; *Cunningham's Appeal*, 57 Penn. St., 474; *Kent v. Westbrook*, 1 Ves. Sr., 278; *Flanders v. Chamberlain*, 24

Mich., 306; *Suber v. McClintock*, 10 W. Va., 236; Pomeroy's Eq. Jurisp., Secs. 1230-1231; Story's Eq. Jurisp., Sec. 1032; Story on Bailments, 9 Ed., Sec. 345; *Ibid*, Sec. 287; also Secs. 308 to 311 inclusive, and notes to Sec. 308; *Jones v. Smith*, 2 Ves. Jr., 378; *Cortelyou v. Lansing*, 2 Cal. Cas. Err., 200; Sec. 245, Story.

As to equity jurisdiction the learned author in Minor's Institutes, Vol. 4, part 2, page 1219, makes seven divisions—the first, the fourth, the sixth and the seventh are applicable to the case at bar, and of those in their order:

“Wherever the matter of account stands upon equitable claims, or has equitable trusts attached to it. 1 Story's Eq., Sec. 454.”

Note—For example: In the case of *Taylor v. Benham*, 46 U. S. (5 How.), 232, it is said:

“Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity as a trustee, for a breach of trust.” *Keaton v. Greenwood*, 8 Ga., 97.

Whenever the liability is that of a bailiff, receiver, factor or agent to his principal. 3 Bl. Com., 437; 1 Story's Eq., 453; *Berkshire v. Coons*, 4 Leigh, 223.

Wherever in matters of accounts growing out of privity of contract, there are mutual demands, and a *fortiori* when the accounts are intricate. 2 Story Eq., 459; *Hunter v. Spotswood*, 1 Wash., 146; *Smith v. Marks*, 2 Rand., 449; *Hickman v. Stout*, 2 Leigh, 6.

Where the accounts are all on one side, but a discovery is sought, and is material to the relief. 1

Stor. Eq., Sec. 459; *Lyons v. Miller*, 6 Grat., 427; *Sturtevant v. Good*, 5 Leigh, 83; *Blodgett v. Foster*, 114 Mich., 688; *Appeal of Electric Brush Co.*, 114 Pa. St., 374; *Society of Shakers v. Watson*, 37 U. S. App., 141; *Johnson v. Price*, 172 Pa. St., 427; 3 Pomeroy's Eq. Jur., 2d Ed., Sec. 1421; *Mitchell v. Manf. Co.*, 2d Stor., 648; the federal judiciary act of 1789.

Under this provision the test of equitable jurisdiction is that which existed when the act was passed, unless subsequently changed by act of congress. Beach's Mod. Eq. Pr., Sec. 12; *McConihay v. Wright*, 121 U. S., 201; Gould and Tucker's Notes to Sec. 723, U. S. Rev. Stat., p. 201.

This enactment of congress is merely declaratory of the existing law. *Boyce v. Grundy*, 28 U. S. (3d Peters), 210; Bispham's Principles of Equity, 4th Ed., 21, and note.

The language, "plain, adequate and complete remedy at law," has been held to refer to the common law, and not to the statutes of the states. *Gordon v. Howbert*, 2 Sumner, 401; *Dodge v. Woolsey*, 59 U. S. (18 How.), 331; *Wright v. Ellison*, 68 U. S. (1 Wall.), 16; *Grand Shute v. Winegar*, 82 U. S. (15 Wall.), 355; *Hungerford v. Sigerson*, 61 U. S. (20 How.), 156; *Oelrichs v. Spain*, 82 U. S. (15 Wall.), 211; *Garrison v. Memphis Ins. Co.*, 60 U. S. (19 How.), 312; Field's Fed. Courts, 433, Note; Book 4, part 1, page 346, Minor's Institutes; 3d Bl. Com., 163; Adams Eq., 222; 1 Stor. Eq., Sec. 442 *et seq.*; 1 Pomeroy's Equity Jurisprudence, Sec. 157.

A bill in equity may be sustained solely on the ground that it is the most convenient remedy. *Conimaugh Gas Co. v. Jackson Co.*, 40 Atl. R., 1,000; 186 Pa. St., 443.

A complainant who seeks discovery, and also to establish a trust, has not an adequate remedy at law *Shainwald v. Davids*, 69 Fed., 687; 75 Mich., 274; *Rowland v. Entrekin*, 27 Ohio St., 47; *Fleming v. Kerkendall*, 31 Ohio St., 568; *Alsdorf v. Reed*, 45 Ohio St., 653; *Black v. Boyd*, 50 Ohio St., 46; *Bricker v. Elliott*, 55 Ohio St., 577; *Grapes v. Barbour*, 58 Ohio St., 669; *Smith v. National Bank*, 60 U. S. App., 431.

In the case at bar, is clear, therefore, that the equitable is the only complete adequate remedy; that it avoids circuity of action; that it is the more speedy remedy—indeed, the only complete and satisfactory remedy.

Malcolm G. Davies, for defendant in error.

The only question is: Has the plaintiff in error a right to an injunction to prevent the defendant in error from prosecuting his action at law?

We hold that she has a complete and adequate remedy at law. That the defendant, in an action at law, has no right to an injunction unless it is clearly manifest that justice can not be obtained otherwise.

The plaintiff in error could have defended in the action against her and set up whatever claim she had and if not satisfied with the judgment of the court, she could have appealed to the common pleas.

The record shows that plaintiff in error does not attempt to get her rights in the case in which she was sued. Her counsel cites the court to numerous cases to the effect that a suit in equity would lie, but he has no case cited that shows that a court of equity has the right to take a cause from a court of law or to enjoin proceeding in a court of law, where there was a complete and adequate remedy in that court. Story, Sec. No. 896, p. 83, Eq. Jur.

Proceeding at law not enjoined when defense may be made at law, nor when appeal lies. High on Injunctions, Sec. 89.

General doctrine denying relief by injunction against action at law where defense can be made. High on Injunctions, Sec. 93.

The principal case tried in this court governing the contention of plaintiff in error is *Chapman v. Lee*, 45 Ohio St., 356.

DAVIS, J. The defendant in error calls to his aid the general rule that an injunction will not be granted against an action at law, where full defense may be made in such action. High on Injunctions, Secs. 89, 93. This familiar rule, however, is general but not universal; and we think that the case at bar comes within a distinctly marked exception, namely, where a pledge is the subject of controversy and it is a family relic, ornament, or heirloom having a special value to the owner, and for the loss of which damages in money would not be an adequate compensation. In such case a tender having been made of the amount previously claimed to be due, and refused, as alleged in this case, and it appearing that an accounting may be necessary to determine the state of running accounts between the parties; and that the sale or disposal of the pawned articles either by execution or otherwise, may cause an irreparable loss to the defendant in the action at law, no good reason appears why equitable relief should not be afforded. Under our code of civil procedure a provisional injunction could be had in an action for the recovery of money only, in the court of common pleas or superior court of Cincinnati, and a full and adequate

defense could be there made without resorting to a separate action.

But the case here is different. The action is in a court of limited jurisdiction. A justice of the peace is not invested with the power to enforce equitable rights or to consider equitable defenses; so that the matters of account, fraud and oppression, irreparable injury and redemption of pledged and mortgaged property alleged here could not lawfully be heard and determined in the justice's court. If adequate relief could be had by appeal from the judgment of the justice of the peace, there might, perhaps, be no ground for this proceeding; but during the time which is required to transplant the case from the justice's court into the court of common pleas the apprehended loss or injury may take place; because on the theory of the defendant in error, equity cannot interfere. By the necessity of the case, then, there could not be a full and adequate protection of the defendant's right before the justice of the peace; and the defendant had the right to resort to a court of general jurisdiction for redemption of the specific property pledged and mortgaged, for such discovery and accounting as may be necessary to determine the actual amount due; and for such restraining order, or orders, as the nature of the case might require.

The judgments of the superior court in general term and special term are

Reversed,

SHAUCK, C. J., WILLIAMS, BURKET and SPEAR, JJ.,
concur.

THE WABASH RAILROAD COMPANY v. FOX, ADM'X.

Ohio courts may have jurisdiction over case of wrongful killing by railway corporation in another state, when—Section 6134a, Rev. Stat.—Enforcement of laws of one state by courts of another—Statutory rule as to use of evidence in such cases—Comity of laws.

1. In order to give the courts of Ohio jurisdiction to adjudge a cause brought by an administrator of one who is alleged to have been in the employ of a railroad corporation and killed by its negligence in another state, it must, by force of section 6134a, Revised Statutes, be shown that such state allows the enforcement in its courts of the statute of this state of like character. It is not sufficient to show merely that the courts of that state entertain actions to recover for wrongful killing in another state.
2. Where an act of the legislature of a sister state gives the personal representative of one who has been killed by the wrongful act of another a cause of action to recover in all cases in which the deceased could have maintained an action had he lived, and a subsequent act by its provisions regulates the liability of corporations other than municipal for personal injuries to persons employed by them, fixes the rules of evidence which shall govern in such cases, and provides that the decisions or statutes of other states shall not be pleaded or proven as a defense, both acts are to be treated as *in pari materia* in determining whether, under section 6134a, Ohio Revised Statutes, the laws of such sister state allow the enforcement in its courts of the statute of Ohio of like character.
3. The enforcement by the courts of such sister state of the acts relating to the liability of corporations for injuries received by employes of such corporations through their negligence, mentioned in the last preceding paragraph, is not the equivalent of the enforcement of the statute of this state of like character.
4. The courts of Ohio have not jurisdiction to hear and determine a suit brought by the administrator of an employe of a railroad company to recover for the wrongful death occurring from the negligence of the company in Indiana.

(Decided February 5, 1901.)

ERROR to the Circuit Court of Lucas county.

The action below was brought in the court of common pleas of Lucas by Mary J. Fox, as administratrix of Jesse F. M. Fox, deceased, against The Wabash Railroad Company, to recover for the death of the decedent alleged to have been occasioned by the negligence of the defendant Company. The accident occurred in the yard of the Company's road at the city of Fort Wayne, in the state of Indiana. Upon trial a verdict and judgment were recovered in that court, which judgment was affirmed by the circuit court. Error is here prosecuted by the company to both judgments.

Smith & Beckwith, for plaintiff in error.

We submit:—

First: That under the laws of Indiana and Ohio applicable to the case in hand this action cannot be maintained.

We submit that the court erred in holding that the law of Indiana can be enforced in Ohio.

Section 6134a, Rev. Stat. Ohio, was enacted in 1894. 91 O. L., 408. Prior to the enactment of this statute, it was uniformly held by our Supreme Court that the provisions of Sec. 6134, giving the action for wrongfully causing death, do not extend to cases where the wrongful act causing death was committed outside of this state, and that the action would not lie in this state in favor of an administrator appointed here on a cause of action arising under a similar statute of another state. *Woodard v. R. R. Co.* 10 Ohio St., 121; *Hover v. Pa. Co.*, 25 Ohio St., 667; *Brooks, Admr., v. Pa. Co.*, 53 Ohio St., 655.

The question in this case is, therefore, whether Indiana is a state which allows the enforcement in

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its courts "of the statute of this state of like character," *i. e.*, the statute giving an action for wrongfully causing death. This statute is Sec. 6134, Rev. Stat., and provides that the action for wrongfully causing death shall exist where the party would have been entitled to maintain an action and recover damages for the injury in case death had not ensued, and it is therefore obvious that the test for determining whether the action for wrongfully causing death can be maintained is,—would there have been a liability had death not ensued? This necessarily makes the rules of law determining the liability part and parcel of the act for wrongfully causing death.

The Indiana act providing for actions for wrongfully causing death is correctly pleaded in the petition in this case, and is substantially similar to the Ohio statute. But the rules of law determining whether a liability would have existed had death not ensued are contained in the Employers' Liability Act of Indiana, upon which plaintiff relies, and which is necessarily a part of the "death statute" in that state. For there as here, the action for wrongfully causing death exists only in cases where a liability would have existed had death not ensued.

If section four of the Indiana Employer's Liability Act, means anything, it certainly means that in all cases where a citizen of Indiana, injured in another state, brings suit in Indiana against the offending railroad company, the rules for determining whether a liability exists or not are the rules prescribed by the statute itself, and that the rules of law of the state where the accident occurred are to be entirely ignored by the courts of Indiana. In other words, it applies Indiana law instead of Ohio law in determining whether a liability exists or not. It is true that

prior to the enactment of this statute the Supreme Court of Indiana held that it would enforce the statute of Ohio for wrongfully causing death, but it has not held since this Employers' Liability Act was passed that it would apply the laws, whether statutory or judicial, of another state in determining whether a liability existed or not. To enforce the Ohio statute for wrongfully causing death and at the same time apply the Indiana law for the purpose of determining whether a liability would have existed if death had not ensued, is certainly not enforcing Ohio law at all.

The vital thing about the statute giving an action for wrongfully causing death is the question of how it shall be determined whether a liability would have existed if death had not ensued. Unless Indiana is willing to enforce the rules of law obtaining in Ohio for determining this question, it is not enforcing the Ohio "death statute" at all.

E. L. Twing and Marshall & Fraser, for defendant in error.

Will the courts of Ohio entertain an action for death occurring in the state of Indiana?

The great weight of authority now supports the view that if such an action is authorized by the law of the place where death occurred, then the courts of other states will entertain the action. Or in other words, that if the cause of action exists at the place where the accident occurs, then it is transitory in its nature and may be brought in any state where service can be had. *Sherman and Redfield on Negligence*, Section 132 and cases cited; *Burns v. Railway Co.*, 113 Ind., 169; *Essenwine v. Pa. Co.*, 11 Dec. (Re.) 277, 25 Bull., 396; *Higgins v. Railway Co.*, 155

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Mass., 176; *Dennick v. Railway Co.*, 103 U. S., 11; *Texas & P. R. R. Co. v. Cor*, 145 U. S., 593; *Northern Pacific R. Co. v. Babcock*, 154 U. S., 190; *Weaver v. Railway Co.*, 21 D. C., 499; *Railway Co. v. Nix*, 68 Ga., 572; *Railway Co. v. Swint*, 73 Ga., 651; *Shedd v. Moran*, 10 Brad. (Ill.) 618; *Hanna v. Railway Co.*, 41 Ill. App., 116; *Railway Co. v. Rouse*, 178 Ill., 132 (Construing this Indiana act.); *Railway Co. v. Hosea*, 152 Ind., 412; *Morris v. Railway Co.*, 65 Iowa, 727; *Bruce v. Railway Co.*, 83 Ky., 174; *Railway Co. v. Graham*, 98 Ky., 688; *Railway Co. v. Boyle*, 60 Miss., 977; *Railway Co. v. Crudup*, 63 Miss., 291; *Railway Co. v. Lewis*, 24 Neb., 848; *Wooden v. Railway Co.*, 125 N. Y., 10; *Knight v. Railway Co.*, 108 Pa. St., 250; *Railway Co. v. Ayers*, 16 Lea (Tenn.), 725; *McLeod v. Railway Co.*, 58 Vt., 727; *Nelson v. Railway Co.*, 88 Va., 971.

We say, therefore, that irrespective of the statute the action is and should be maintainable in Ohio, according to the great weight of authority.

The plaintiff in error claims that the Ohio courts will not entertain this action for the reason that under Sec. 7086, Indiana Rev. Stat., the courts of Indiana would not enforce our death statute.

The wording of the statute substantially is that when suit is brought *by a person*, a citizen of Indiana, who is injured while in the employ of company, then in the suit for such *injury* the laws of Indiana, the place where the contract was made, shall govern whenever there is any conflict between those laws and the laws of the state where the injury occurred.

This principle, is recognized at the present time by the laws of Ohio and other states. *Pittsburg & Lake Erie R. R. Co. v. Blair*, 5 C. D., 366, 11 C. C., 579, (affirmed by Supreme Court January 12, 1897.) *Alea-*

ander v. Pa. Co., 48 Ohio St., 623; *Railway Co. v. Ranney*, 37 Ohio St., 665; *Ott v. Railway Co.*, 10 C.D., 85, 18 C. C., 402; *Knowlton v. Railway Co.*, 19 Ohio St., 260; *Railway Co., v. Jackson*, 31 L. R. A., 276.

Actions for causing death are clearly controlled by the laws in force in the state where the accident occurred. They are not actions for breach of contract. *Burns v. Railway Co.*, 113 Ind., 174; *Railway Co. v. McMullen*, 117 Ind., 439.

We submit further that even admitting that the statute was passed for the express purpose of affecting the liability of railroad companies where they were sought to be held liable for the death of a citizen of Indiana which occurred outside of the state, then that fact would not prevent the Ohio courts from entertaining an action for death caused in Indiana.

The substance of our statute, Sec. 6134a, as we read it, is that whenever a foreign state *entertains* an action for death occurring in our state, then the courts of Ohio will *entertain* like actions for death caused in such other state.

We believe that another sufficient and conclusive answer to the contention of the plaintiff in error in this case upon this point is that if a citizen of Ohio in the employ of the Wabash Railroad Company, was killed in Indiana under the same circumstances as the decedent in this case, *the Indiana courts would entertain the action* and enforce the liability, precisely as would the Ohio courts. There is absolutely no difference between the laws of the two states as applied to this case.

We must insist at the outset of the discussion of this question in all of its branches, that under Sec. 6710, Rev. Stat., and the decisions of this court, that the question the court is now asked to consider, to-

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wit: passing upon the weight of the testimony, is one that cannot be raised in this court. *Woolley v. Staley*, 39 Ohio St., 354.

SPEAR, J. A question at the threshold of the case is raised respecting the jurisdiction of the Ohio court to entertain the action, objection being made that, by force of the statutes of this state and of Indiana, the courts of this state may not entertain an action by the personal representative of an employe against a railroad company where the injury arose from the negligence of the company in the latter state and death has ensued. It being conceded that the right of action rests wholly upon statutory law, not being authorized by the common law, consideration of the question involved here requires an examination of the statutes of the two states bearing upon the subject.

Section 285 of the Revised Statutes of the state of Indiana reads as follows:

“Section 285. [Action for Death of Another, Limitation.]—When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. This action must be commenced within two years. The damages cannot exceed ten thousand dollars and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.”

The title of the Indiana act of March 4, 1893, known as the Employers' Liability Act, is as follows:

“An act regulating liability of railroads and other corporations, except municipal, for personal injury

to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state: Provided, further, that its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency. (Approved March 4, 1893.)"

Then follow provisions specifying the conditions under which the employe may recover of the company for injuries occasioned by its negligence, and among others where the injury is caused by the negligence of any person in the service of the company who has charge of a locomotive.

Sections three and four of the act are as follows:

"Sec. 3. The damages recoverable under this act, shall be commensurate with the injury sustained, unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions: . Provided, that where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and, pending such appeal, the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

"Sec. 4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such rail-

road is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state."

Section 6134, Ohio Revised Statutes, is substantially similar to Section 285 of the Indiana statute, quoted above, and for that reason need not be reproduced here.

It is established law in Ohio, however, that section 6134 does not extend to wrongful acts causing death outside of this state, and that prior to the passage of section 6134a, Revised Statutes, no action by an administrator for such cause could be maintained in our courts. That section, which was enacted May 21, 1894, reads as follows: "6134a. [Right by statute of other state, territory or country enforced.] Whenever death has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state in all cases where such other state, territory or foreign country allows the enforcement in its courts of the statute of this state of a like character; but in no case shall the damages exceed the amount authorized to be recovered for a wrongful act or default in this state, causing death. Every action brought under this act where the death has already occurred shall be commenced within one year from the passage of this act; and in all other cases, within the time prescribed for the commencement of such

action by the statute of such other state, territory or foreign country."

It is apparent from this section that a condition to the right to maintain such action in this state, where the injury occurred in another state, is that such state allows the enforcement of the statute of this state of like character. That is, if by the laws of such foreign state our statute will be enforced in an action based upon alleged death from negligence occurring in Ohio, then a party may maintain an action of like character here where injury was received in such other state; otherwise not.

It is apparent, also, that if section 4 of the act of Indiana heretofore quoted (the act known as the Employers' Liability Act), applies to this case, then the statute of Ohio would not be given force in Indiana, for the specific provision is that in a suit brought by a citizen of that state, an employe of a railroad company operating a line in that and another state, to recover for an injury inflicted in such other state, the corporation shall not plead or prove the decisions or statutes of such state as a defense. No such limitation upon the right of defense is to be found in any statute of Ohio.

It is insisted that this section does not apply because it relates to suits for injury by the employe only, and not to suits for death by a personal representative, as the case at bar. That is, it applies only to a case of violation of contract by the employer, and hence is simply declaratory of the common law that the law of the place where the contract is made governs. But, it is further insisted, if this were not so, that the wording of our Ohio statute does not prevent our courts from taking jurisdiction because the substance of it is that whenever a foreign state will

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entertain an action for death occurring in our state, then, by the clear provisions of section 6134a, the courts of our state will entertain like actions for death caused in such other state. And, inasmuch as section 285 of the Indiana statute and section 6134 of our statute, each providing for a case of death, are similar, it is clear that the courts of that state would entertain an action for death occurring in this state.

It is difficult to dissever these Indiana statutes. They both relate to a recovery for an injury to an employe arising from the negligence of the company. That which gives a right of action to the representative where the employe does not survive, gives such right under circumstances which would have given the employe such right had he survived, and in no other. That the right of the representative to maintain the action is predicated upon the right which the injured person would have had, and is no broader, is distinctly held in *Helman v. The P. C. C. & St. L. Ry. Co.*, 58 Ohio St., 400. Hence, in order to determine whether the representative would have such right of action against the company, recourse must be had to the Employers' Liability Act to determine what conditions must obtain before the employe could maintain an action, had he survived. The two, therefore, are *in pari materia*; they go together. This seems to have been the intention of the framers of the later act as expressed in section 3 by the provisions that the right of action, when death results, shall survive to the representative, and shall be governed in all respects by the law in force as to such actions which, of course, includes section 285. And, taking both the acts together, it seems plain that the test of liability against the company which the Indiana courts will recognize, is

found in the Indiana statute, and not in any Ohio statute or decision. In other words, Indiana law prevails; Ohio law is not considered. If then the later act is to be regarded at all in arriving at an understanding of the law of Indiana in a case of death, what warrant is there for excluding section 4 from consideration? The "suit for such injury," specified in the section, must mean *any* suit for such injury. It may be brought by the employe if he be alive, but if not, then his representative, under favor of section 285, may maintain the action; and if prosecuted by the injured employe to judgment, and that be reversed, and he die, then the action will survive to his legal representative. If the claim of defendant in error be correct, and this section is to be excluded from consideration in case death has ensued, let us see how it would result practically. A suit is brought direct by an employe injured in another state through which the inter-state line passes, and as to his cause of action the section will prevent the company from setting up any decision or statute of the state where the accident occurred as a defense. Another suit for an injury to another employe, who by the same negligence was killed, is brought by his representative, and, as to such cause of action no inhibition as to defenses exists. A similar condition would arise in case of a trial of a cause revived in the name of the representative after judgment in favor of the employe had been reversed. It seems not reasonable to conclude that the law-makers of our sister state intended any such discrimination as between one who is merely injured, and the widow and next of kin of one who was killed outright.

Nor is there ground for saying that our statute, section 6134a, is satisfied by the mere entertaining by

the courts of another state of a cause of action for death occurring in our state. Such is not the language of the law. It is not the entertaining of the suit that is stipulated for, but enforcement of our statute of like character. This means that it is the law of Ohio which the sister state will enforce; not necessarily the law of that state, for where there is an essential difference as has already been pointed out, it cannot be said that by enforcing their own law the court of the other state is enforcing our statute. Our statute rests upon the ground of reciprocity which is based upon the idea of comity, and the very essence of reciprocity implies that each state, as to the subject matter, shall have and enforce indential laws; not simply provisions which may be in many respects similar, but in all essential particulars the same. It seems to us clear that the laws of Indiana, while they permit the bringing of actions in the courts of that state to recover for death occurring in another state, require the determination of the rights of the parties by the provisions of their own laws, but do not enforce the laws of the state where the injury was committed.

Attention is called by counsel for defendant in error to the case of *The P. C. C. & St. L. Ry. Co. v. Hosea*, 152 Ind., 412. We are unable to see that the decision aids their contention. It is true the court sustained an action against the company for death occurring in Kentucky, but it is equally true that the court was guided by the law of Indiana and enforced that law. Indeed the reference to the subject of Kentucky law in the last paragraph of the opinion indicates that as the counsel had not argued in their brief whether the complaint should be determined by

the laws of Kentucky or of Indiana they had waived it.

But if the later act is to be wholly excluded from consideration, a result would seem to follow entirely fatal to the action, although on a different ground. The negligence complained of is that of a locomotive engineer. The deceased was a brakeman of another train. By the law of Indiana as it stood before the passage of the Employers' Liability Act, the engineer was a fellow-servant with the brakeman; hence there would be no liability on the company for his acts. *Spencer v. The Railway Co.*, 130 Ind., 181. So it would appear that plaintiff below was compelled to rely upon the act referred to as a part of her cause of action, and it was relied upon, for we find parts of the act set out in the petition.

The question of jurisdiction was properly made at the trial. We are of opinion that, under the laws of the two states applicable to the cause of action of the plaintiff below, that action cannot be maintained in an Ohio court, and that the courts below erred in holding otherwise. This conclusion renders it unnecessary to determine the other assignments of error presented by the record and argued by counsel. The judgments below will be reversed, and, inasmuch as the court of common pleas had not jurisdiction to entertain the action, final judgment of dismissal will be entered here.

Reversed.

SHAUCK, C. J., BURKET and DAVIS, JJ., concur.

THE STANDARD HOME AND SAVINGS ASSOCIATION
COMPANY ET AL. v. JONES ET AL.

Jurisdiction of action to set aside deed of assignment for benefit of creditors—Belongs to court of common pleas and not probate court—Action by stockholders against building and loan association and its assignee—Cannot be settled by association and its assignee unless stockholders consent, when—Jurisdiction—Assignment for creditors.

1. The court of common pleas has jurisdiction of an action to set aside or vacate a deed of assignment for benefit of creditors, for fraud or other good cause, and the probate court has no jurisdiction of such action.
2. When an action is brought by stockholders in a building and loan association against such association and its assignee for the benefit of creditors, to set aside the deed of assignment for fraud or want of power to make the deed, a settlement between the association and its assignee satisfactory to both, will not be a settlement as against the complaining stockholders, unless they consent to the same.

(Decided February 5, 1901.)

ERROR to the Circuit Court of Belmont county.

On December 12, 1897, Fred B. Jones and three others filed a petition in the court of common pleas, against the above named plaintiff in error, and one Henry G. Pratt, and a demurrer to said petition having been sustained, said plaintiffs below, on leave, filed an amended petition, which is as follows, omitting caption and signatures:

“Plaintiffs say that the Standard Home and Savings Association Company is a corporation, organized under the laws of the state of Ohio, to do business as a building and loan association in said state of Ohio, and its residence and place of doing business is at Martins Ferry, Belmont county, Ohio.

"Said association began business as a building association in the year 1888, and has received dues, made loans and continued to do business as such association until October 29, 1897.

"The plaintiffs are all stockholders of said association, Fred. B. Jones owning twenty shares, David H. Souders five shares, Alexander Davidson six shares and Hiram Frazier five shares of stock therein, each share being of face value of \$100.00

"On the 29th day of October, 1897, a pretended assignment for the benefit of creditors was made of its property and assets to H. G. Pratt, and the same carried into execution by an order of a board of directors, who without notice to or the knowledge of the stockholders of said association, had, before the making of such deed of assignment, and in contemplation thereof, withdrawn or transferred all stock which each of them had owned when elected to said office.

"The persons claiming to act as directors at the time of the ordering and executing of said assignment were J. P. Crowell, James A. Bayless, Jesse Selby, L. W. Inglebright, William Beall, Jephtha Reel and J. F. Blumenburg. For some time prior to said assignment the said James A. Bayless and J. P. Crowell had owned no stock in said association. That in contemplation of said assignment and immediately prior thereto Jesse Selby and William Beall had sold all their stock. That immediately before the said assignment and in contemplation thereof all the other members of said board of directors, with the exception of Blumenburg, withdrew and transferred all unawarded stock held by them or secured adjustment of all loans made to them by said association, receiving in such withdrawals and adjustments the face value

of all monies paid in by them. That all stock transferred by any of said directors was transferred to other members of said board and by them used in the adjustment of their loans, except a portion of the stock of said Jesse Selby, which was by him transferred to his wife, and said alleged board of directors caused a mortgage to be executed to her, to secure the payment of the value thereof, to-wit, \$400.00 to her.

"At the meeting at which said assignment was ordered to be executed, there were present and voting the said James A. Bayless, J. P. Crowell, Jesse Selby, L. W. Inglebright and William Beall. The vote on the motion to assign was yeas, Bayless, Inglebright and Beall; nays, Crowell.

"Plaintiffs are informed and therefore allege it to be a fact that said meeting of said board of directors was a special meeting, and that no notice thereof, setting forth the time and place of meeting and the purpose for which the meeting was called was served upon said Blumenburg and Reel or for that matter on any of the members of said board of directors.

"The said board of directors drew their money out of said association out of their order and in advance of other stockholders of said association, who had long before given notice of withdrawal under the rules, constitution and by-laws of said association. Said acts and official misconduct on the part of said board of directors was prompted and brought on by their belief that the capital and assets of said association had so far become impaired that upon winding up of its affairs by a proper proceeding, stockholders would not receive dollar for dollar of their contributions, but on the contrary, there would be considerable loss to stockholders; that said board of directors, acting un-

der said belief, drew out what they had therein and made said adjustments aforesaid in order to prefer themselves and to avoid their liability and to escape sharing in the expected loss which they believed would fall upon all members of said association.

"That the said H. G. Pratt, now assignee under the pretended deed of assignment, was, at the time of the execution of said assignment, and for a long time prior thereto, had been, the regularly elected attorney of said association, and legal adviser of said board of directors; that he advised, aided and abetted the said board of directors in their said misconduct, and that he knew of their withdrawal of stock, and adjustment of loans from said association, and the purpose for which the same had been effected as above set forth, and had advised them in regard thereto. That he had counseled and advised the said board of directors to order the execution of said deed of assignment to himself knowing that at the time of said deed of assignment was ordered executed, as well as when it was actually executed, each of said directors had ceased to be members of said association. That said H. G. Pratt beside assisting said directors in withdrawing their stock and adjusting their loans, planned or assisted in planning said assignment; that before said meeting at which said assignment was ordered and before the same had been considered by said board of directors, he had prepared the deed of assignment and all other papers necessary to carry out said assignment.

"Said plaintiffs, as well as the stockholders generally, had no knowledge or notice that said assignment was contemplated, nor did they before its execution, nor have they since, consented to said assignment.

"Plaintiffs further say that said assignment of the property and assets of said association to the said H. G. Pratt was unnecessary, unwarranted and uncalled for, and that said association was not at the time of assignment in an insolvent condition under the laws providing for the assignment for the benefit of creditors, that on the 29th day of October, 1897, the assets of said association amounted to at least the sum of \$23,256.92, that the total amount of debts due or to become due to outside creditors was \$702.36; that except said sum of \$702.36 there were no claims against said association except such as were based upon the ownership of stock therein. That the said H. G. Pratt had in his hands at the date of the making of his inventory and appraisal as such assignee of the moneys belonging to said association, the sum of \$2,201.44.

"Plaintiffs say that said H. G. Pratt is proceeding to sell real estate belonging to said association and to convert securities of said association into money in spite of the facts as above set forth, that by such actions he is incurring unnecessary expense to the irreparable damage of plaintiffs as well as to the association itself.

"The plaintiffs further say that the said wrongful assignment has deprived many members of said association of the right of paying their dues, and that many members paid dues up to the date of said assignment and still desire to pay the same and carry out their contract with the said association, but the said assignee is not receiving, nor has he any power to receive said dues, to the detriment and loss of the plaintiffs and to the association itself.

"Wherefore plaintiffs ask that the said deed of assignment be declared null and void, that an injunc-

tion be granted restraining said Pratt from selling real estate of said association, and from further converting its assets into money, and for such further relief as is proper."

The cause was heard upon this amended petition and a motion for an injunction. The court held that it had no jurisdiction of the subject matter of the action, and therefore dismissed the petition, and struck the case from the docket, to all of which the plaintiffs below excepted.

The circuit court reversed the judgment, and thereupon the plaintiffs in error came to this court, seeking to reverse the judgment of the circuit court.

Henry G. Pratt and James C. Tallman, for plaintiff in error.

There is no question that the act governing voluntary assignments, and beginning with Sec. 6335, is a special act, made especially applicable to assignments for the benefit of creditors; and being a special act, making special provisions for deeds of assignment to be controlled by the probate court, it becomes exclusive, and deprives all other courts of jurisdiction of such deeds. *Wambaugh, Trustee, v. Insurance Co.*, 59 Ohio St., 228; *Gilliland v. Administrator of Michael Sellers*, 2 Ohio St., 223; *Railway Co. v. Marshall*, 11 Ohio St., 497.

Now, it being clear that in the matter of assignments, that the common pleas court would only have jurisdiction under Secs. 6344 and 6351, Rev. Stat., let us see whether either section would apply to this case.

This is an action seeking to set aside a deed of assignment for benefit of all the creditors of assignor, on the alleged ground of want of power of assignor

to execute same, etc.; in other words, defendants in error are asking the court to determine the *legal effect* of said deed.

While Sec. 6343 provides a method for setting aside conveyances made with intent to hinder, delay or defraud creditors, which is an entirely different thing from this case, we never have been able to find where any court has ever held a deed of assignment made for the benefit of all creditors of assignor, to be a conveyance made to hinder, delay or defraud creditors; but, on the other hand, we find where courts have held just the opposite. *Hoffman v. Mackall*, 5 Ohio St., 124; *Thomas v. Talmadge*, 16 Ohio St., 434.

The other section which the court refers to in the case in *Second Nat'l Bk. v. Moderwell*, 59 Ohio St., 221, 223, *i. e.*, Sec. 6351, simply regards the settlement of questions of lien or title, or dower estate of wife may be settled by assignee in the court of common pleas, which has no application to a case like the present.

Is it not rather strange to claim that the probate court is a mere machine, and that when a deed of assignment is filed in said court, that said court cannot have the right to say whether it is a deed or not?

The deed of assignment, if it is valid, places the property in the custody of that court (the assignee being merely the agent or hand of the court). Why then, would not the probate court have the exclusive right (subject to right of appeal and error) to determine whether the control of said property had been legally transferred by said deed into the custody of said court?

Property in the hands of an assignee for creditors, who has duly qualified, is in *custodia legis*.

See authorities collated in note to *Hardy v. Tilton*, 28 Am. Rep., 35, and in note to *Pipher v. Fordyce*, 22 Am. Law Reg. (N. S.), p. 666; Wait's Actions and Defenses, Vol. 6, page 617.

T. W. Shreve and C. A. Mabon, for defendants in error.

It is contended by defendants in error that the appeal is to the equity powers of a court of general equity jurisdiction and that the fact that the instrument attacked is a deed of assignment is not one of the most important facts in the case. Plaintiff in error contends that it is the controlling fact. It is not questioned herein, that the common pleas court is a court of general equity jurisdiction, and as such has jurisdiction of the subject matter of this action, unless taken away by statute.

The jurisdiction of courts of equity or of higher courts proceeding according to the course of the common law, is never taken away except by plain words or equally plain intendment. Black on Interpretation of Laws, page 123.

The probate court is of limited and statutory jurisdiction, with such auxiliary and incidental powers as are necessary and proper to carry into effect those expressly granted. *Saylor v. Simpson*, 45 Ohio St., 141; *Clapp v. Banking Co.*, 50 Ohio St., 528.

When a deed of assignment has been filed in the probate court in accordance with Sec. 6335, Ohio Rev. Stat., and the assignee has qualified, that court is clothed with jurisdiction to fully execute the trust. *Havens v. Horton*, 53 Ohio St., 342; *Farwell v. Findley*, 5 C. D., 303, 11 C. C., 100; *McNeill v. Hagerty*, 51 Ohio St., 255.

We contend that when a deed of assignment is not obviously illegal, and to set it aside would require a hearing upon an issue to be made between the parties, that issue must be made and hearing had in a court of general equity jurisdiction. *Preston v. Spaulding*, 120 Ill., 208; Burrill on Assignments, 6th Ed., Sec. 451.

We do not contend that the probate court has no equity jurisdiction or that exclusive jurisdiction in such a case as this could not have been conferred upon it by statute, but we do contend that all equity jurisdiction it has was conferred by statute, and that there is no statute expressly conferring power upon it to inquire as to the validity of any instrument, certainly not of a deed of assignment.

The reasoning of the circuit court is sustained by the fact that property in the hands of an assignee under a voluntary assignment is not *in custodia legis*. *Lapp v. VanNorman*, 19 Fed., 406; *Lehman v. Rosengarten*, 23 Fed., 642; *Powers v. Blue Grass B. and L. Association*, 86 Fed., 705.

Deed of assignment invalid:

1. Because authorized at a special meeting of the board of directors, of which an absent director did not have notice. 1 Beach on Priv. Corp., Sec. 273; 1 Morawetz on Priv. Corp., Sec., 532; 3 Am. & Eng. Ency. Law (2d Ed.), 24 n.

2. Because the persons who were at said meeting and voted to assign had at that time ceased to be members of the corporation, of which fact H. G. Pratt had notice.

Directors and other managers of a private corporation are merely agents, and the corporation can be charged with their acts only in accordance with the

established doctrines of agency. Morawetz on Corp. Sec. 640.

An agent whose authority has been terminated, cannot bind his principal in dealings with one having notice of such termination.

Directors of corporations must be holders of stock in an amount to be fixed by the by-laws. Section 3248, Rev. Stat.

The company is bound by what takes place in the usual course of business with a third person, where that third person deals *bona fide* with persons who may be termed *de facto* directors and who might, so far as he could tell, have been directors *de jure*. Morawetz, Sec. 637.

The above proposition rests on the principle of estoppel, and with the limits of estoppel the scope of its application is determined. It is also held that the principle on which the validity of the acts of *de facto* officers is sustained against the corporation does not apply where all the persons affected have notice that the officers assuming to act were not legally chosen. Taylor on Priv. Corp. Sec. 190; *State v. Curtis*, 9 Nev. 325; *Orr Water Ditch Co. v. Reno Water Co.*, 17 Nev., 166.

3. Directors of an Ohio building association have no power to assign, especially where the association is not insolvent.

Dissolution of an association must be by vote of stockholders. Sections 3836-3, Rev. Stat.

BURKET, J. The substance of the petition is, that the persons who assumed to act as directors of the association in the making of the deed of assignment, had ceased to be directors, and therefore had no power to make the deed, that they acted fraudulently, in bad

faith and against the interests of the stockholders, and that the assignee had full knowledge of the want of power, and of the fraud and bad faith, and actively participated therein.

That such a deed should be set aside and vacated, at the suit of any party in interest, needs no argument and no citation of authorities; and the only question in the court of common pleas was, whether that court had jurisdiction of the subject matter. The court was of opinion that it had not jurisdiction, and that the probate court alone had such jurisdiction, and therefore it dismissed the petition and struck the case from the docket. The question is as to the correctness of this ruling.

When a deed affecting a right of property has been made by one having no power to make a valid deed, or is made fraudulently, and accepted by the grantee with notice of the fraud or want of power, such deed may be set aside and vacated by the party whose property is thereby affected, by proper action for that purpose in the court of common pleas. This is conceded to be so as to all deeds except deeds of assignment for the benefit of creditors; and as to such deeds the plaintiffs in error insist that the probate court has exclusive jurisdiction. Is this so? The court of common pleas has jurisdiction of the subject matter of setting aside and vacating deeds for fraud or want of power to make them, in all cases, unless such jurisdiction has been taken away by statute, and such statute would have to be express, a mere implication arising from conferring the same jurisdiction upon the probate court would not be sufficient. Sutherland on Statutory Construction, Secs. 395, 396.

But we need not resort to this rule. Our statutes confer jurisdiction upon the probate court to carry

the deed of assignment into execution; and while the same is being administered under the orders of the probate court, under and in pursuance of the trust created by such deed, it is clothed with all necessary equity powers to hear and determine all questions arising as to the property conveyed by the deed of assignment.

Taking the deed to be valid, the jurisdiction of the probate court extends only to causing the trust created thereby to be executed according to law; but it has no jurisdiction to set the deed aside, or vacate it for fraud, or other cause. The probate court has jurisdiction to act under the deed of assignment, but not in opposition to it. The full extent of the statute is that the probate court shall have jurisdiction to direct the execution of the trust under the deed, that is, "to qualify assignees, control their conduct and settle their accounts." Section 524, Revised Statutes. But there is no statute prescribing that it shall have general equity power to set aside and vacate the deed of assignment; and such equity power is not implied from the power to act under the deed; and certainly no implication can arise from the granting of such power to act under the deed, that the court of common pleas is thereby deprived of its general equity jurisdiction as to setting aside and vacating deeds obtained by fraud.

It is therefore clear that the court of common pleas has jurisdiction in such cases, and that the probate court has no such jurisdiction. The judgment of the circuit court reversing the judgment of the common pleas, is therefore right and should be affirmed.

A showing is made in this court to the effect that said association and said Henry G. Pratt have, since this case has been pending in this court, made a set-

tlement, and they plead that settlement, and ask this court to mark this case settled and dismissed. This cannot be done. Mr. Pratt and the association are on one side of the controversy, and are charged in the petition with being in collusion with each other, and a settlement of their differences would not be a settlement of the differences between them and the defendants in error. If the plaintiffs below proceed, as they have a right to do, after the case gets back into the court of common pleas (*Moss v. Board of Education*, 58 Ohio St., 354), and prosecute their action, and succeed in setting aside the deed of assignment, the assignee may learn that his settlements do not conclude the matter, and that the plaintiffs below have a right to be consulted and heard, before the matter is finally closed up.

It is further shown that a receiver has been appointed by the court of common pleas since this case is pending here, and that he has now in his hands substantially all that is left of the estate of the association. When such an association becomes insolvent, it is best to wind it up through a receiver, rather than an assignee. In fact it has been doubted whether a building loan association can make an assignment for the benefit of creditors, under the statutes governing such corporations, but we do not find it necessary to decide that question in this case, as the question was not raised or relied upon in the petition, and was not passed upon by either of the courts below.

Judgment affirmed.

SHAUCK, C. J., WILLIAMS, SPEAR, and DAVIS, JJ., concurred.

THE BOARD OF COMMISSIONERS OF FULTON COUNTY v.
THE BOARD OF COMMISSIONERS OF HENRY
COUNTY.

*County ditches—Amount to be paid by upper to lower county—
Section 4510-3, Revised Statutes—Error will not lie to ac-
tion of the probate court appointing freeholders, when.*

Error will not lie to the action of the probate court appointing freeholders, as provided by Section 4510-3 of the Revised Statutes, to estimate and report the amount which should be paid by the upper to the lower county, for the benefits of an outlet ditch.

(Decided February 5, 1901)

ERROR to the Circuit Court of Henry county.

On the 29th day of March, 1899, the commissioners of Henry county made an application to the probate court of that county, in the form of a petition against the commissioners of Fulton county, under Section 4510-2 of the Revised Statutes. The petition states, in substance, that proceedings had been commenced and carried on before the Henry county commissioners for deepening and straightening a water course known as Turkeyfoot creek, which furnished the only outlet for a drain and watercourse extending through certain sections of land in Fulton county, that county adjoining Henry, and being the upper county. It further states that the proposed improvement will furnish a better outlet for the Fulton county drain, and better drainage for the lands in that county; and, that the steps required by law had been taken to obtain a joint meeting of the commissioners of the two counties, in order that they might agree upon the amount which should be paid by the commissioners of Fulton county for the benefit re-

sulting to it from the improvement referred to, but that at the meeting held for that purpose there was a failure to agree. The prayer of the petition is for the appointment by the court, as provided in Section 4510-3 of the Revised Statutes, of two disinterested freeholders, to act with a like number to be appointed by the probate court of Fulton county, as a committee to estimate and report to the court the amount that should be justly paid by Fulton county for the use and benefit of the outlet ditch, and for further proceedings authorized by the statute. The commissioners of Fulton county were served with process, appeared and plead, and the court, after a hearing, made an entry on its journal appointing two disinterested freeholders to act on the estimating committee, in accordance with the provisions of the statute. Without awaiting any further steps in the proceeding the commissioners of Fulton county instituted a proceeding in error in the court of common pleas to reverse the action of the probate court in making the appointment. The common pleas affirmed the probate court, and on error prosecuted to the circuit court, the common pleas was affirmed; from which latter judgment error is brought here.

William H. Fuller and *William H. Handy*, for plaintiff in error.

H. R. Ditmer and *W. W. Campbell*, for defendant in error.

BY THE COURT:

It is entirely clear that the record shows no judgment or final order of the probate court that can be reviewed on error. The statute provides for further proceedings subsequent to the appointment of the

committee, which may result in the complete exoneration of the upper county and of the lands therein from any burden for the proposed improvement of the water course, or in a final order or judgment imposing such burden. If the former result shall be reached through the report of the committee that the upper county should bear no part of the burden, there can be no ground for a proceeding in error in its behalf, nor can there be until such burden is imposed by the judgment or order of the court.

Judgment affirmed.

SHAUCK, C. J., SPEAR, BURKET and DAVIS, JJ., concur.

THE STATE OF OHIO EX REL. SHEETS, ATTORNEY GENERAL, v. COWLES ET AL.

Cleveland Park Commission—Invalidity of Act of April 6, 1900—94 O. L., 517—Act of April 16, 1900—94 O. L., 670—Sections 1 of Article 13 and Section 26 of Article 2 of constitution—Constitutional law.

The act of April 6, 1900, entitled "An act to provide a board of park commissioners and to provide for the acquisition of grounds for parks, etc., in cities of the second grade of the first class" (94 O. L., 517); and the act of April 16, 1900, supplementary thereto (94 O. L., 670), are void because repugnant to Section 1 of Article 13 of the constitution and to Section 26 of Article 2 of the constitution.

(Decided February 5, 1901.)

IN QUO WARRANTO:

The defendants admit that they assume, and are about to exercise, the official powers attempted to be conferred upon them as the board of park commissioners in and for the city of Cleveland by the legis-

lative acts following, by issuing bonds in the sum of five hundred thousand (\$500,000), dollars, levying taxes for their payment and for the payment of taxes on the bonds of said city previously issued and of exercising said powers generally. The Attorney General denies the constitutional validity of said acts; and his petition prays that the defendants be ousted from said office and from the exercise of all said powers. The legislation referred to consists of "an act to provide a board of park commissioners and to provide for the acquisition of ground for parks, * * * etc., in cities of the second grade of the first class," passed April 6, 1900 (94 O. L., 517), and the act supplementary thereto passed April 16, 1900 (94 O. L., 670). The material parts of said legislation are the following:

The act of April 6, 1900, is as follows:

"AN ACT

"To provide a board of park commissioners, and to provide for the acquisition of grounds for parks, park entrances, park driveways and boulevards, and for the improvement, management and control of parks, park entrances, park driveways and boulevards, in cities of the second grade of the first class.

"(CLEVELAND.)

"Be it enacted by the General Assembly of the State of Ohio:

"Section 1. In cities of the second grade of the first class, there shall be a board of park commissioners composed of five persons who shall be electors of the county in which are situated such cities. Said board of park commissioners shall be appointed by the

judge[s] of the circuit court of the judicial circuit in which said counties and cities are situated, or any two of them, together with the probate judge of said counties. Said board of park commissioners shall be appointed one member for a term of one year, one member for a term of two years, one member for a term of three years, one member for a term of four years, and one member for a term of five years, and they shall hold their office until their successors are duly chosen or elected as hereinafter specified. In case of any vacancy caused by death or otherwise, of any of said members so appointed, said vacancy shall be filled for the unexpired term by the same appointive power. Commencing with the first Monday of April, 1901, one member of said board of park commissioners shall be chosen by the electors of such cities for a period of five years, and one member shall be chosen for a period of five years upon the first Monday of April of each succeeding year to fill the vacancy caused by the expiration of the term of the member whose term then expires * * * .

"Section 2. Such board of commissioners shall have exclusive charge, supervision and control of the parks, park entrances, park driveways and boulevards * * * in such cities or in the counties in which such cities are situated. Such board of park commissioners shall have power to acquire and hold property in the name of the city, by purchase or condemnation, for public parks, for the enlargement of public parks, park entrances, park driveways or boulevards, to receive gifts, donations and devises of lands or other property for public parks, park entrances, park driveways and boulevards, on behalf of such cities, and in the name of such cities; to lay out, construct and improve with walks, drives, roads and bridges,

shelter houses and other improvements, the public parks, park entrances, park driveways and boulevards, held by it or under its control; to enter into contracts for the construction, enlargement and improvement of such parks, park entrances, park driveways and boulevards; to adopt rules and regulations, regulating the use of the same and the travel and traffic thereon, and to prevent disorder and improper conduct within the precinct of any park, park entrance, park driveway or boulevard. All rules and regulations which such board shall at any time pass, shall, immediately after its passage and before taking effect, be published at least ten days in two daily newspapers of opposite politics, and of general circulation, printed in such city. Such board of park commissioners shall also have power to agree with the owner or owners of any street railway occupying any part of any park entrance, driveway or boulevard, or any public road, street or avenue, which may be placed under the charge of such board of park commissioners, as provided in section 8 of this act, for the removal of any such street railway therefrom, which, in the opinion of such board of park commissioners, may interfere with the use of any park, park entrance, park driveway or boulevard, road or street, for park purposes, and upon the terms of such removal and the amount of compensation agreed upon to be paid to such owner or owners, and the same shall be paid out of the park funds hereinafter provided to be raised by special assessment. Provided, however, that no such agreement for removal shall be made until there shall be filed with the board of park commissioners a written application therefor, signed by the persons owning a majority of the frontage

upon any street, avenue, or part of street or avenue, from which such street railway is to be removed.

"Section 4. It shall be unlawful for any person to cut, injure or deface any tree, building or fence, or other erection in the park; to turn domestic animals or poultry of any description upon the parks, or to permit them to wander therein; to carry firearms within, or to frighten, hurt or kill animals or birds belonging to the parks; to hinder or interfere with men employed upon the parks. All persons found violating the provisions of this section, or any of the rules, regulations or ordinances adopted by any such board or the city council shall be guilty of a misdemeanor, and shall be punished upon conviction before the police court of said city, upon complaint and proceedings as now had and provided by law in cases of misdemeanor and violations of city ordinances, by a fine not exceeding fifty dollars, and in default of payment be imprisoned not exceeding thirty days, and the jurisdiction of the police court of such cities is hereby expressly extended to include all parks, park entrances, park driveways and boulevards, belonging to such cities and under the control of such board, whether within or without the corporate limits of such cities. Such board of park commissioners and their officers and employes, shall have power to make arrests for misdemeanors committed within the precincts of any park, park entrance, park driveway or boulevard, under their management and control, whether within or without the limits of such cities, or for the violation of any rules, regulations or ordinances established by such board or city council, for the government of such parks. Such board of park commissioners shall have power to seize and impound, any cattle, horses, mules, donkeys, goats, swine, sheep

or other animals, or any poultry of any description found running at large upon such parks, park entrances, [park] driveways, or boulevards, to impose a penalty not to exceed five dollars, with reasonable expenses upon each animal or the poultry so seized, and to enforce payment thereof in such manner as the rules and regulations may provide.

"Section 5. Any person violating any of the rules, regulations of [or] ordinances of any such board or park commissioners, or city council, or violating any statute of Ohio relating to parks or boulevards or ordinances of any municipal corporation relating to parks or boulevards, in which there is any such board of park commissioners shall be liable to a civil action for damages to be brought by such board of park commissioners in the name of any such city; and the amount recovered shall be paid into the park expense fund of such corporation herein provided for."

Section 6 confers power to employ a secretary, superintendent, landscape gardener, laborers, care-takers and other employees.

"Section 7. Such board of park commissioners shall have power to appropriate, enter upon and condemn for public use, and hold and possess on behalf of and in the name of such cities, any property for enlarging any park, parks or public ground, now owned by any such city; and for establishing such public park or parks, park entrances, park driveways and boulevards, as in the opinion of such board of park commissioners it may be necessary from time to time to establish, either within or without the limits of such cities; * * *

"Section 9. Such board of park commissioners shall also have power by a four-fifths vote, to take charge of, control and improve any public road, street,

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State ex rel. Sheets v. Cowles et al.

avenue, alleyway, * * * or grounds of any kind or any part thereof, within or without any such cities, for the purpose of a park entrance, park driveway or boulevard, with the consent of the proper municipal authorities, or of the other corporations or public officers or authorities owning or having charge thereof.

“Section 11. For the purpose of carrying out the provisions of this act, and also for the purpose of assisting to pay for constructing, enlarging or improving, or extending any park, park entrance, park driveways or boulevard, such board of park commissioners is hereby authorized and empowered to make special assessments upon all property benefited by any such constructing, enlarging, improving or extending any park, park entrance, park driveway or boulevard, to the extent such board shall decide; and in proportion to the benefit which may result therefrom, whether such property so benefited shall be within any such city or within the county * * * .

“Section 12. Such board of park commissioners shall also have power to vacate or close up, within the limits of any park or parks any and all public roads and highways, excepting railroads which may pass through, divide or separate any land selected or appropriated by it for parks, upon payment of damages, if any, caused by such vacation, to the owners of private property injured thereby, to be ascertained in the manner now provided by law, and such damages, if any, shall be paid out of the park funds, and no such road or highway, and no railroad, whether street or steam, shall be laid out through any park or parks, except with the consent of such board of park commissioners and city council; but the proper municipal authorities of such cities may grant the right to cross

the park driveways or boulevards with steam or street railroads.

"Section 14. It shall be the duty of such board of park commissioners, or its successors, annually, to levy on the real and personal property of any such city a tax sufficient to pay the interest of all bonds issued under the provisions of an act entitled 'An act to provide a board of park commissioners and to provide for the acquisition of grounds for parks, park entrances and park driveways, for the improvement, management and control of parks, park entrances and park driveways in cities of the second grade of the first class,' passed April 5, 1893; and also to pay all interest upon all bonds issued under the provisions of an act entitled 'An act supplementary to an act to provide a board of park commissioners, and to provide for the acquisition of grounds for parks, park entrances, and park driveways, and for the improvement, management and control of parks, park entrances, and park driveways, in cities of the second grade of the first class, passed April 5, 1893,' passed April 27, 1896. Also to pay all interest of all bonds issued under the provisions of an act entitled, 'An act supplementary to an act to provide a board of park commissioners, and to provide for the acquisition of grounds for parks, park entrances and park driveways and the improvement, management and control of parks, park entrances and park driveways in cities of the second grade of the first class, passed April 5, 1893, and also an act passed April 27, 1896,' passed April 26, 1898."

The act of April 16 is in form and matter supplementary to the act whose provisions are abstracted; and it provides, among other things, for the borrowing by said park board of the sum of one million

dollars in addition to all funds heretofore authorized to be borrowed for park purposes and to issue bonds therefor and the levying of taxes for their payment.

John M. Sheets, Attorney General, and *Solders & Tilden*, for plaintiff.

We claim that both of these acts are unconstitutional for the following reasons:

First. The powers attempted to be exercised by the legislature by these two acts, over cities of the second grade of the first class, are *administrative*, and not *legislative*, and in conflict with Secs. 1, 19 and 20, Art. 1, of the constitution of Ohio, and in conflict with the fourteenth amendment of the constitution of the United States in that they attempt to deprive persons of property *without due process of law*. *State ex rel. v. Commissioners*, 54 Ohio St., 33, (Paddock Road case.)

In the case of the *State ex rel. v. Covington*, 29 Ohio St., 102, the court sustained a law appointing a board of police commissioners, in cities of the first grade of the first class, but it will be noted that this board simply had control over the police force of the city, with power of appointment to the force and removal therefrom, 73 O. L., 70.

In the case of the *State ex rel. Hibbs v. Commissioners*, 35 Ohio St., 458, the court sustained an act of the legislature authorizing and directing the commissioners of Franklin county to levy a special tax for the purpose of improving a road from the city of Columbus, along Greenlawn avenue to its terminus in the old Chillicothe road, 74 O. L., 472.

This case is overruled by the Paddock Road case, *State ex rel. v. Commissioners*, 54 Ohio St., 333, above

referred to and by the Montgomery road case referred to below.

In the case of the *State ex rel. Herron v. Smith*, 44 Ohio St., 348, the court sustains an act of the legislature establishing a board of public affairs in cities of the first grade, first class. 83 O. L., 173.

The case of the *Commissioners v. State ex rel.*, 50 Ohio St., 653, is the case commonly known as the Montgomery Road case. This act (90 L. L., 205) authorizes and directs the commissioners of Hamilton county to proceed to improve Montgomery Turnpike by widening and extending the same in a manner provided in the act.

These, briefly stated, are the holdings in Ohio relating to the question of local self-government. As we have stated, the case of *State ex rel. v. Covington*, 29 Ohio St., 102, did not raise the question of the power of the legislature to appoint a board with power of local taxation. The *State ex rel. Hibbs v. Commissioners* case, 35 Ohio St., 458, did raise the question of the power of the legislature to impose directly burdens by taxation and special assessment upon the people of a county for local improvements, and the power was sustained, but this case is directly overruled by the Montgomery Road case, 50 Ohio St., 653, from which we have quoted the opinion of Judge Minshall, concurred in by Judge Burket; and is also overruled by the Paddock Road case, 54 Ohio St., 333.

The case in *State ex rel. v. Smith*, 44 Ohio St., 348, is expressly distinguished by the court from a case where the power to impose burdens by taxation is involved, as will appear from the quotation we have made from the case. So that we have 50 Ohio St., 653, and 54 Ohio St., 333, squarely holding that the legislature has not the power to pass a law imposing

burdens by taxation and assessment upon the people of a given county or township without the initiative being given to the people of the county or township in this matter. In the one case, (50 Ohio St., 653,) it is said to be the taking of property without due process of law; and in the other case, (54 Ohio St., 333,) it is said to be the exercise of an *administrative* not a *legislative* power, and the denial of the right of local self-government, which is inherent in our institutions.

Should the principles of local self-government be extended to cities?

The organization of townships and counties is provided for by Art. 10 of the constitution. The organization of cities is also provided for by Sec. 6 of Art. 13 of the constitution.

The language of Sec. 6, Art. 13, is that the legislature shall *restrict their* power of taxation and assessment, etc. By implication this delegates the power of taxation and assessment for local purposes to the municipal corporation whose organization is to be provided for, and the power reserved to the legislature is merely restrictive. *Hill v. Higdon*, 5 Ohio St., 243; *Maloy v. City of Marietta*, 11 Ohio St., 636.

Before the adoption of the present constitution, cities and villages were created by special laws, and to remedy this it was provided by Sec. 6 of Art. 13 that they must be organized by *general* laws.

Clearly, the legislative power is not enlarged by Sec. 6, Art. 13, and the power to pass the acts of April 6 and April 16, 1900, must be found, if it is to be found at all, under Sec. 1 of Art. 2.

Under the general grant of power by Sec. 1 of Art. 2 of our constitution, what power and control has the legislature over municipal corporations therein? This question has not been adjudicated in Ohio. It has,

however, been decided in other states, and to these decisions and the principles thereof, we invite the court's attention. *Dillon on Municipal Corporations*, Sec. 66; *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.), 694; *Benson v. New York*, 10 Barb., 223.

The distinction between the *public* side of a municipal corporation, where it represents the state as its agent, and the *private* side of such corporation where it represents the property interests of its citizens as their agent, is clearly recognized in Ohio. In the one case it is acting in a governmental capacity and is not liable for the acts of its agents and servants, and in the other case (acting in a private capacity), it is liable for the acts of its agents and servants the same as a private corporation or individual. *College of Medicine v. Cleveland*, 12 Ohio St., 375; *Wheeler v. Cincinnati*, 19 Ohio St., 19; *Toledo v. Commissioners*, 41 Ohio St., 149; *Robinson v. Greenville*, 42 Ohio St., 625; *Frederick, Admr., v. Columbus*, 58 Ohio St., 538; *People v. Hurlbut*, 24 Mich., 44; *Park Commissioners v. Detroit*, 28 Mich., 228; *People ex rel. v. Batchelor*, 53 N. Y., 128; 3 Hills Rep., 531; 31 Penn. St., 175.

The legislature cannot compel a city to incur a debt or obligation without its consent. *Dillon on Municipal Cor.*, Sec. 71 to Sec. 74 inclusive; 31 Vt., 226; *People v. Mayor of Chicago*, 51 Ill., 17.

The acts of April 6 and April 16, 1900, are special acts conferring corporate powers, and are therefore in conflict with Sec. 1 of Art. 13 of the constitution. The act of April 6 (1900), so far as it provides for an elective park board, confers on the people of Cleveland the power to elect this board, with the right in it, the said board, to exercise the powers conferred.

This confers corporate powers on the city of Cleveland.

The act of April 16, 1900, confers power on this board to issue one million dollars of bonds in the name of the city and for and on behalf of the city; and the city council is authorized and empowered to levy a tax to pay the principal of these bonds. That these two acts attempt to confer corporate power we think will not be disputed. *State ex rel. v. Smith*, 48 Ohio St., 211; *State v. Pugh*, 43 Ohio St., 98.

T. H. Hogsett and John G. White, for defendants.

The first objection to said acts of April 6 and 16, 1900, is that the powers attempted to be exercised by the legislature were *administrative* and not *legislative*. This objection necessarily prompts the inquiry: What powers has the legislature attempted to exercise by the passage of these acts?

It attempted—

First, to create the office of park commissioner.

Second, to provide for filling such office.

Third, to define the powers and prescribe the duties of the board of park commissioners when constituted.

The power of the legislature to provide for the creation of a board of park commissioners in cities of the second grade of the first class, must, in view of the adjudications by this court, be conceded as settled. *State ex rel. v. Hawkins*, 44 Ohio St., 98; *Smith v. Lynch*, 29 Ohio St., 261; *State ex rel. Herron v. Smith*, 44 Ohio St., 348.

In the above case, as in the case at bar, it was argued by counsel that the legislature could not take from the people of a municipality the right to choose directly or indirectly, their officers of local adminis-

tration and confer such right upon the governor of the state. *People v. Hurlbut*, 24 Mich., 44; *Park Commissioners v. Detroit*, 28 Mich., 228; *Western College v. Cleveland*, 12 Ohio St., 375; *People v. Mayor*, 51 Ill., 31.

But the court did not seem to be of opinion that that doctrine was applicable to such case in Ohio. In the case of *Smith v. Lynch, Treas., supra*, a board of health was constituted pursuant to an act of the general assembly.

That the general assembly of the state has power to provide for the filling of such office in the manner pointed out by this law, seems so firmly settled it appears almost to be a work of supererogation to submit to the court argument or authorities in support of such power. Section 27, Art. 2, of the constitution of Ohio; *State ex rel. v. Kennon*, 7 Ohio St., 547; *Ohio ex rel. v. Covington*, 29 Ohio St., 102; *State ex rel. v. Constantine*, 42 Ohio St., 437.

It seems clear, therefore, that the legislature has not exceeded its constitutional authority in providing for the appointment of a board of park commissioners, as designated in the act of April 6, 1900. The legislature did not undertake to make the appointment, but designated the persons, viz.: "The judges of the circuit court of the judicial circuit in which said counties and cities are situated, or any two of them, together with the probate judge of said county" to make the same.

We come now to a discussion of the question whether the acts of April 6, 1900, 94 O. L., 517, creating a board of park commissioners, and the act of April 16, 1900, 94 O. L., 670, empowering the board of park commissioners to issue a million dollars of bonds, are unconstitutional because in violation

of Art. 13, Sec. 1 of the constitution: "The general assembly shall pass no special act conferring corporate powers."

And Art. 13, Sec. 6: "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws."

Before proceeding to the consideration of the principal question, we shall only stop to express a doubt whether, if these are local laws applying to Cleveland alone, conferring incidentally corporate powers, they are for that reason necessarily void. The constitutionality of the former Cleveland park board act is not assailed. Under that statute many hundreds of acres of park land have been acquired; many hundred thousand dollars spent, and the city now finds itself with a system of parks incomplete, some finished, some unfinished, some requiring for their fitting and adequate use according to the plans intended by the former park board, the acquisition and improvement of further lands. This would make a local temporary necessity which this court seems to us to have held might be met by appropriate legislation. *Merrill v. Toledo*, 3 C. D., 524, 6 C. C., 430. Affirmed, 29 Bull., 220; *Kumler v. Silsbee*, 38 Ohio St., 445.

Assuming, then, without discussion, that the act creating the board of park commissioners does confer corporate powers, is it true that it is a special act? We insist that it is not, but a general law.

The general rule determining the question of whether a law applying to a municipality is a general or a special law, a legitimate or illegitimate exercise of the right given by the constitution to classify the municipalities, is well settled, and in any given case doubt can only be as to the application of the rule.

State v. Pugh, 43 Ohio St., 98.

The argument is that no other municipality than Cleveland could have come into the second grade of the first class in time to hold the first election of park commissioners on the first Monday of April, 1901.

It was not only possible when this law was passed, but it is possible today for Cleveland to pass out of this grade before April, 1901, and for other municipalities of the state to come into the second grade and first class and to hold the first election of park commissioners in the charter election of 1901. Section 1547, Rev. Stat.

This official report is a report of the secretary of the state of Ohio. *Hayes v. Cleveland*, 55 Ohio St., 117.

This is the report of the secretary of state, provided for by Sec. 1617, Rev. Stat., and must be made on or before November 20th of each year. Section 62, Rev. Stat; *State ex rel. v. Hudson*, 44 Ohio St., 137.

From this it appears that it is not sufficient to make a law a special law that only one municipality can hold the first election at the time indicated in the statute. It must also be true that no other municipality can at any time thereafter on coming into the proper class appoint the officers and fill their place by election as provided by this statute. *Marmet v. State*, 45 Ohio St., 63; *State ex rel. v. Wall*, 47 Ohio St., 499; *State ex rel. v. Toledo*, 48 Ohio St., 112; *State ex rel. v. Smith*, 48 Ohio St., 211; *State ex rel. v. Baker*, 55 Ohio St., 1; *State ex rel. v. Ratterman*, 58 Ohio St., 731.

The much cited name of *State v. Pugh*, 43 Ohio St., 98, and previous cases hold that such a grant as this made to an unincorporated municipal board is not a statute conferring corporate powers. *State v. Cov-*

ington, 29 Ohio St., 102; *State v. Baughman*, 38 Ohio St., 455.

Further than this, we do not think the question as to the constitutionality of a law empowering a constitutional board to borrow money and issue bonds can be raised by *quo warranto*.

SHAUCK, C. J. The view presented by the relator is that this legislation confers corporate power, that it is special because it applies to the city of Cleveland alone, and that it is therefore repugnant to section 1 of article 13 of the constitution which ordains that: "The general assembly shall pass no special act conferring corporate powers." Counsel for the defendants, of course, admit that it confers corporate power and that in its present operation it confers it upon the city of Cleveland and upon no other municipality. They say, however, that the operation of the act is restricted to the city of Cleveland, not by naming that city, but by describing it by a grade and class in which that city stands alone. The proposition necessary to give importance to that distinction is that the validity of legislative acts is to be determined, not by their present actual operation, but by their possible future operation. No reason is offered in support of that proposition. Indeed the proposition is uniformly suppressed.

The inevitable reliance of counsel for the support of this legislation is upon the decisions of this court sustaining the validity of legislation, dividing the cities of the state into classes and grades so that said cities are isolated, for the purpose of receiving grants of corporate power not conferred upon any other city. Such legislation was originally sustained upon the theory that the classification would remain un-

changed, and that in the progress of the state's development other cities would enter the classes existing. It was a judicial prophesy that an act whose practical operation was special when it was passed and considered would, in time, operate generally. How this prophesy failed of fulfillment appears from the fact that for a quarter of a century the five largest cities of the state, have, in important respects, been subject to acts conferring corporate power and operating in each of them separately. With but little modification the same observation might be made of many other municipalities. It has resulted that to a majority of the urban population of the state the provisions of this article of the constitution have become chiefly known as sources of hope which have never been realized. It is quite true that many appeals for relief from such legislation have been made to this court based on the claim that these beneficent provisions of the constitution should be put into practical operation. It is equally true that the doctrine of classification, or such isolation under the form of classification, has been adhered to. The reports show that a majority of the members of the court have regarded themselves as bound to pursue a course upon which our predecessors inadvertently started. A careful examination of the cases seems to warrant the observation that since the practical effect of the doctrine has been demonstrated, the cases upon the subject have been followed without approval except in the separate opinion of Minshall, J., in *State ex rel. the Attorney General v. Ratterman et al.*, 58 Ohio St., 731. These observations are made here only to show that a doctrine so completely discredited should not be extended. The present case is to be decided in deference to that doctrine and to the decisions upon

which it rests. Some members of the court seem willing to have it understood that they really entertain such deference. Others of us are willing to assume it for the purposes of this case, as it will permit us to reach what we conceive to be the correct conclusion with respect to this legislation.

We are not now to test these acts by our knowledge of their actual operation, but we are to imagine that the classification is to remain unchanged indefinitely so that without limit of time other municipalities may enter the same grade and class with Cleveland and so become subject to all legislation which is valid as to that city, and then inquire whether all of the cities which may enter said grade and class will become subject to the acts now under consideration. In the first section of the act of April 6 it is provided that the first election to the board of park commissioners shall be held on the first Monday of April, 1901; and of course it can operate only in cities which on that day are in the second grade of the first class. In the brief of counsel for the defendant this point is met with the suggestion that under existing statutes the cities of Toledo and Columbus, having the population required to advance them to the second grade of the first class, might by their voluntary action effect such advancement so that they might be, or at least they might have been, advanced before the first Monday of April, 1901, and there would be three cities subject to the operation of this legislation. In the view we are now taking of the subject this suggestion of the imagination is legitimate; but it is manifestly inadequate. It assumes that the doctrine of classification will be satisfied if the legislation applies to a plurality of the cities belonging to the grade and class. The

doctrine is not quite so bad as that. It is of its essence that every municipality in the state now below the first class may be advanced to the second grade of the first class upon its attaining the requisite population and taking appropriate action for that purpose, and that everyone of them, when so advanced, without limit as to their numbers or the time of their advancement shall become subject to every legislative act which is now valid as to that grade and class. It is, therefore, quite evident that at this point the imagination of the framer of these acts wearied in its flight, and failed. That the city of Cleveland alone was in contemplation in this act is quite evident from others of its provisions which are set out in the statement of the case.

Because the doctrine of classification of cities is not to be extended this legislation is void in view of others of its provisions. According to that doctrine such classification has been recognized as effective to prevent the present actual operation of the constitutional provision quoted, prohibiting conferring of corporate power by special acts; and acts conferring such power have been held valid although they actually conferred it upon but one city. But when that classification has been resorted to for the purpose of evading the requirement of section 26 of article 2 of the constitution that: "all laws of a general nature shall have a uniform operation throughout the state," its efficacy for that purpose has been denied. *Commissioners v. Rosche Brothers*, 50 Ohio St., 103; *City of Cincinnati v. Steinkamp, Trustee*, 54 Ohio St., 284. By repeated and explicit provisions these acts are to operate in Cuyahoga county outside of the city of Cleveland, and in no other county of the state. Among

State ex rel. Sheets v. Cowles et al.

the subjects of a general nature to be controlled by the act of such limited operation is that of roads. For the act assumes to authorize the commissioners to vacate existing roads and to establish others at their discretion. It cannot be necessary to repeat the reasons which have led this court to the conclusion that roads are a subject of general legislation within the meaning of this provision of the constitution.

The fourth section attempts to create misdemeanors by provisions peculiar to Cuyahoga county. And the provision that "all persons found violating the provisions of this section or any of the rules or regulations or ordinances adopted by any such board or the city council shall be punished on conviction," etc., can hardly be construed otherwise than as an attempt to delegate to the board authority to define misdemeanors. Perhaps no laws are more commonly regarded as general than those which define and punish crimes and misdemeanors. But added exposition of the subject cannot be necessary in view of the former decisions. *Ex parte VanHagan*, 25 Ohio St., 426; *Ex parte Falk*, 42 Ohio St., 638; *The State v. Winch*, 45 Ohio St., 663.

In *Ex parte Falk* it was held that an act which provided for the punishment of any person found in any city of the first grade of the first class or within four miles thereof having burglars' tools in his possession, and extending jurisdiction of the police court of the city over such offenses to said limit of four miles beyond said city, was void for repugnancy to this section. Enactments which prohibit acts at or near places whose character makes such acts peculiarly hurtful are not exceptions to this rule, for their operation is as wide as their subject.

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The present case does not call in question the power of the general assembly to prohibit and punish depredations in public parks, if the power is exercised by a law operating wherever its subject is found. Consideration of other provisions of the act is omitted because unnecessary to a conclusion in the case.

Judgment of ouster.

BURKET and DAVIS, JJ., concur.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD CO.
v. ALLER.

64 188
66 541

Railroad station platform—Liability and duty of railway company incident to guarding and lighting platform.

A railway company having constructed its station and a platform incident thereto does not, by permitting persons to use such platform for purposes of their own not connected with the transaction of business at such station, become charged with a duty to reconstruct guard or light such platform so as to render it safe for the permitted use. (P., F. W. & C. R. Co. et al. v. Bingham, 29 Ohio St., 364, approved and followed; Harriman v. Ry. Co., 45 Ohio St., 11, distinguished.)

(Decided March 12, 1901.)

ERROR to the Circuit Court of Lucas county. (On rehearing.)

Aller brought suit in the common pleas against the plaintiff in error and the New York, Chicago & St. Louis Railroad Company to recover for personal injuries by him sustained in stepping from the platform, which was maintained by the plaintiff in error at a suburb in the village of Leipsic, at a station jointly constructed and used by said company and the New York, Chicago & St. Louis Railroad Company (called

the Nickel Plate) at the crossing of their roads. He charged that the plaintiff in error was negligent because it kept no lights about its station and because it did not raise the earth or provide steps at the end of the platform where he received his injury, or place upon the platform at that point a balustrade to keep footmen from stepping off. The answer denied the allegations of negligence against the company and averred that whatever injury Aller sustained was the result of his own negligence. The plaintiff replied denying the allegation of negligence against him.

Upon the trial much evidence was introduced, the larger portion of it relating to the extent and nature of Aller's injuries. We are concerned only with that portion of the evidence which relates to his right to recover. In that portion of the evidence there is no material conflict. At a point on the line of the company's road about half a mile north of the village of Leipsic the other railroad crosses it approximately at right angles. At the southwest angle of the intersection the companies maintain a joint building consisting of ticket and telegraph offices and waiting room. Upon the north side of the building, and occupying the space between it and its track, the Nickel Plate maintains a platform for use in connection with its trains, and on the east side of the building the C. H. & D. Company maintains a like platform for its similar use, the platform being twelve feet in width and extending southwardly from the junction a distance of 289 feet. On the morning of his injury, at about five o'clock, while it was yet dark, Aller reached the junction by a train of the Nickel Plate road, intending to take a train of the C. H. & D. Company for Ottawa. The train for Ottawa was, according to its schedule time, to arrive at the junction something

more than three hours later and it was scheduled to stop at the junction to discharge and receive passengers. Whether by one light or more the room at the junction station was lighted, and employes of the company were there attending to their appropriate duties. Provisions were made for the sale at the junction office of tickets for the train to Ottawa. Whether acting upon information which he had received a year before that the train for Ottawa did not at that time stop at the junction, or for some other purpose not connected with his trip, Aller after alighting from the train which had brought him to the junction carrying out a previously formed intention passed eastwardly to the corner of the building, thence southwardly on the platform of the plaintiff in error past the ticket office and waiting room, intending to go to the village and take the train for Ottawa at another station which this company maintained there. Footmen had been accustomed to go from the junction to the village by passing southwardly along the platform of the defendant to a point near its south end, thence from the east side of the platform to the track which they then followed to the village. This was done by so many persons and for so long a time that the company's employes in charge of its premises would be presumed to have knowledge of the custom. Aller had himself pursued this course a year before. On this occasion, however, he did not pass from the side of the platform to the track, but continued southwardly along the west side of the platform to its end which was in the common and not connected with any lighted or used street. Knowing that he had reached the end of the platform, being unable to see what was before him, and assuming that from the platform to the ground was an ordinary step, he stepped off at a venture at a point

where it was approximately five feet from the surface of the platform to the ground below, and thus received the injuries for which he brought the action. The platform was constructed in 1886 or 1887 and maintained without change from that time until Aller received his injuries in November, 1893.

Upon this evidence and with respect to the right to recover the court charged the jury as follows:

"As against the C., H. & D. Railroad Company the jury will consider all the evidence and determine whether the C., H. & D. Company allowed and invited passengers who arrived at the junction station to pass along its platform to the southerly end thereof, and thence along its tracks leading to the Leipsic town station. If it did invite such use and with knowledge thereof acquiesced in the use for a long period of time, it will be held to the exercise of care accordingly, having due regard to such use and proportioned to the probable danger to passengers arriving at the junction who might go that way.

"If the jury find that the defendant, the C., H. & D. Company, did so invite the use of its platform and adjoining tracks, it was bound to exercise reasonable and ordinary care in having them safe for such use, and if the jury find that it failed and neglected to exercise such reasonable and ordinary care, so that the plaintiff in going that way fell from the platform of the C., H. & D. Company, without negligence on his part, at a place where the said company had failed in the exercise of ordinary care to have a safe and proper approach to the platform, then your verdict will be for the plaintiff."

With respect to the contributory negligence of the defendant the court charged as follows:

"Dr. Aller was obliged to use ordinary care and prudence in taking his way from the platform where he alighted from the Nickel Plate train. If, considering all the circumstances of the situation, there would not have appeared to a reasonably prudent person any danger in going along the place and in the manner that he did, then he cannot be said to have been guilty of contributory negligence, though in fact injury followed what he did. In determining the question of whether the plaintiff himself was negligent or not, the jury will take into consideration the time of night, and what, if any, light there was to guide his footsteps, together with the information and knowledge he had as to where he should go to take the C., H. & D. train."

The following instructions requested by the company were refused by the court:

"If you find from the evidence that the train of the defendant, The Cincinnati, Hamilton & Dayton Railroad Company, which the plaintiff intended to take, was not due to arrive at said junction station until 8:26 A. M., or thereabouts, and if you further find from the evidence that the plaintiff arrived at said station on a train of the New York, Chicago & St. Louis Railroad Company at 5 A. M., or thereabouts, and if you further find from the evidence that the plaintiff did not intend to take a train of the Cincinnati, Hamilton & Dayton Railroad Company at said junction station, but did intend to take a train of said defendant at its station about one-half mile distant, then the defendant did not owe the plaintiff the duty of lighting its platform or of guarding the end of the said platform.

"It was the duty of the plaintiff, while walking along said platform, to exercise such care as an or-

dinary prudent person would exercise under like circumstances, and the fact it was dark, and that he was unacquainted with the character or condition of said platform, made it incumbent upon him, before stepping off the end of said platform, to ascertain, so far as he reasonably could, whether it would be safe so to do; and if you find from the evidence that the plaintiff stepped off the end of said platform without making any attempt before so doing to ascertain whether it would be safe so to do, then your verdict must be for the defendants."

A verdict was returned in favor of Aller and against the plaintiff in error. Its motion for a new trial was overruled and a judgment was rendered on the verdict. A bill of exceptions was taken setting out all the evidence and presented to the circuit court with a petition in error. The judgment of the common pleas was there affirmed.

Swayne, Hayes & Tyler, for plaintiff in error, cited the following authorities:

Gillis v. Railroad Co., 59 Pa. St., 129; *Harriman v. Railway Co.*, 45 Ohio St., 11; *Railway Co. v. Hummell*, 44 Pa. St., 375; *Railway Co. v. Norton*, 12 Harris, 465; *Mason v. Railway Co.*, 6 Am. & Eng. R. R. Cas., 5; *Railway Co. v. Maryland*, 19 Am. & Eng. R. R. Cas., 88; *Railroad Co. v. Bingham*, 29 Ohio St., 369; *Railroad Co. v. Brown*, 18 S. W. Rep., 670; *Railroad Co. v. Godfrey*, 71 Ill., 500; *Railroad Co. v. Brinsom*, 10 Ga., 207; *Railway Co. v. Tartt*, 64 Fed. Rep., 826; *Railroad Co. v. Huffman*, 28 Ind., 287; *Railroad Co. v. Graham*, 95 Ind., 286; *Ivens v. Railway Co.*, 103 Ind., 27; *Railway Co. v. Schmidt*, 106 Ind., 73; *Railway Co. v. Bryan*, 107 Ind., 51; *Beach Contrib. Neg.*, 67-68; *Palmer v. Railway Co.*, 112 Ind., 250; *Carlton*

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v. *Steel Co.*, 99 Mass., 216; *Railroad Co. v. Griffin*, 100 Ind., 221; *Green v. Linton*, 27 N. Y. Sup., 891; *Cusick v. Adams*, 115 N. Y., 55; *Gillespie v. McGowan*, 100 Pa. St., 144; *Sweeney v. Railroad Co.*, 10 Allen, 368; 2 Wood on Railroads, Minor's Ed., p. 1462; *Railroad v. Schwindling*, 8 Am. & Eng. R. R. Cas., 544; *Woodwine, Admr., v. Railroad Co.*, 50 Am. & Eng. R. R. Cas., 37; *Pierce on Railroads*, 275; *Railway Co. v. Treadwell*, — N. E. Rep., 807; *Eggeman v. Railroad Co.*, 47 Ill. App., 507; *Blanchard v. Railway Co.*, 126 Ill., 416; *Railroad Co. v. Hetherington*, 83 Ill., 510; *Railroad Co. v. Houston*, 95 U. S., 697; *Roden v. Railroad Co.*, 133 Ill. App., 72; *Dillon v. Railway Co.*, 154 Mass., 478; *Railway Co. v. Moseley*, 57 Fed. Rep., 921; *Kirtley v. Railway Co.*, 65 Fed. Rep., 386; *Railroad Co. v. Noble*, 142 Ill., 578; *Abend v. Railroad Co.*, 111 Ill., 902; *Barstow, Admr., v. Railroad Co.*, 143 Mass., 535; *Greenleaf on Ev.*, 15th ed., Sec. 114; *Hutchinson on Carriers*, 2nd ed., Sec. 562; *Heinlein v. Railroad Co.*, 16 N. E., 698; *Akers v. Railway Co.*, 60 N. W. Rep., 669; *DeBlois v. Railroad Co.*, 73 N. W. Rep., 637; *Elevator Co. v. Lippert*, 63 Fed. Rep., 942; *Troy v. Railroad Co.*, 99 N. C., 296; *Bennett v. Railroad Co.*, 102 U. S., 577; *Coal Co. v. Estievenard*, 53 Ohio St., 43; *Railway Co. v. Lowell*, 151 U. S., 209; *Keefe v. Railroad Co.*, 142 Mass., 251; *Railroad Co. v. Lucas*, 21 N. E., 968; *Railway Co. v. Yurley*, 84 Fed. Rep., 269; *Forsyth v. Railroad Co.*, 103 Mass., 510; *Reed v. Railroad Co.*, 4 S. E. Rep., 587; *Railway Co. v. Hodges*, 24 S. W., 563; *Felton v. Aubrey*, 74 Fed. Rep., 350; *Heaven v. Pender*, 11 Q. B. D., 503.

Hurd, Brumback & Thatcher, for defendant in error, cited the following authorities:

Harriman v. Railway Co., 45 Ohio St., 11;
Heaven v. Pender, 11 Q. B. D., 503; *Corby v. Hill*, 4

C. B. (N. S.) 556; *Sweeny v. Railroad Co.*, 92 Mass., 372; *Kay v. Railroad Co.*, 65 Pa. St., 269; *Railway Co. v. Sue*, 25 Neb., 772; *Railroad Co. v. Watson*, 94 Ala., 634; *Garner v. Trumbull*, 94 Fed. Rep., 321; *Thompson v. Railway Co.*, 93 Fed. Rep., 384; *Troy v. Railroad Co.*, 99 N. C., 298; *Railroad Co. v. White*, 84 Vt., 498; *Davis v. Railroad Co.*, 58 Wis., 646; *Delaney v. Railroad Co.*, 33 Wis., 67; *Griffiths v. Railroad Co.*, 14 L. T., 797; *Cooley on Torts*, 605; *Railroad Co. v. Griffin*, 100 Ind., 221; *Cusick v. Adams*, 115 N. Y., 55; *Barry v. Railroad Co.*, 92 N. Y., 289; *Byrne v. Railroad Co.*, 104 N. Y., 362; *Railroad Co. v. Bingham*, 29 Ohio St., 364; *Pennsylvania Railroad v. Snyder*, 55 Ohio St., 342; *Transfer Co. v. Field*, 97 Fed. Rep., 881; *Beard v. Railroad Co.*, 48 Vt., 101; *Railroad Co. v. Trautwein*, 52 N. J. L., 169; *Railroad Co. v. Long*, 81 Tex., 253; *McDonald v. Railroad Co.*, 26 Iowa, 124; *Buene-man v. Railroad Co.*, 32 Minn., 390; *Patten v. Rail-way Co.*, 32 Wis., 524; *Railroad Co. v. Hammer*, 72 Ill., 347; *Hydraulic Works v. Orr*, 83 Pa. St., 332; *Schilling v. Abernethy*, 112 Pa. St., 437; *Railway Co. v. Crosnoe*, 72 Tex., 79; *Kinchlous v. Elevator Co.*, 57 Kans., 374; *Purnell v. Railroad Co.*, 122 N. C., 832; *McKone v. Railroad Co.*, 51 Mich., 601; *Bennett v. Railroad Co.*, 102 U. S., 577; *Railway Co. v. Lowell*, 151 U. S., 209; *Keefe v. Railroad Co.*, 142 Mass., 251; *Lucas v. Penn. Co.*, 120 Ind., 205; *White v. Railcay Co.*, 89 Ky., 478; *Watson v. Land Co.*, 92 Ala., 320; *Patterson Ry. Acc. Law*, 222; 2 Wood on Rail-ways, sec. 1389; 2 Shear. & Red. on Neg., 410; *Whar-ton on Neg.*, sec. 376; *Clark v. Howard*, 88 Fed. Rep., 199; *Davenport v. Ruckman*, 37 N. E., 568; *Ohliger v. Toledo*, 10 Circ. Dec., 762; 20 C. C. R., 142; *Chicago v. Babcock*, 143 Ill., 358; 2 Thompson on Neg., 1197; *Beach on Contrib. Neg.*, sec. 246; *Low v. Railway Co.*,

72 Me., 313; *Bronson v. Oakes*, 22 C. C. A., 520; *Railway v. Wright*, 54 Ohio St., 181; *Railway Co. v. Murphy*, 50 Ohio St., 135; *Railway Co. v. Howard*, 40 Ohio St., 6; *Brisbane v. Martin*, 19 App. Cas., 252; *Railroad Co. v. Buck*, 96 Ind., 346; *Lapline v. Railroad Co.*, 40 La. An., 661; *Stewart v. Ripon*, 38 Wis., 584; *Railway Co. v. Kemp*, 21 Md., 74; *Ehrgott v. Mayor*, 96 N. Y., 265; *Scott v. Shepard*, 3 Mil., 403.

SHAUCK, J. The station house with its appropriate rooms and the platforms were obviously adapted to the use of the two roads in the interchange of traffic. They were so used. Passengers desiring to transfer from one road to the other were, therefore, invited to use them for that purpose. And this invitation implied an undertaking that the platforms were reasonably safe for that purpose. It follows that if the plaintiff had received his injuries while making his way with reasonable care to the ticket office or waiting room his right to recover would be entirely clear.

But he entered upon the platform with an intention previously formed not to use it for that purpose. Pursuing that intention he set out to use the platform and the track of the company as a way to reach the village a half mile distant, and having knowingly passed the ticket office and waiting rooms where employes would have provided him with a ticket and with information of the movement of trains, if he was not already informed, he had reached a point somewhat more than two hundred feet from the office when he received his injuries. The duties which the company owed him were such only as arose out of the relation to it which he had thus voluntarily assumed. It is said that the frequency with which the platform and track were

used by footmen as a way to pass from the vicinity of the junction to the village, and the long continuance of that use, raise a presumption that those who represented the company in charge of its ground had knowledge of the use, and that from acquiescence with knowledge, permission may be inferred. If this is conceded it will serve no further purpose than to place the plaintiff in the position of one so using the platform and grounds of the company by permission. But there is no ground for the contention that the company had invited the plaintiff and others to use the platform and track for the purpose which he had in view. It is quite true that the invitation to go upon the platform of a railway company is usually implied from the community of interest, that is, the interest of the traveler in being transported and of the carrier in transporting him. Here, however, was no community of interest. It is conceivable that the condition of the ways and commons gave to footmen an interest in so using the platform and track, but that the company was interested in having them so used is inconceivable. It is the subject of frequent observation that footmen use the bridges of railways for their convenience in the crossing of streams, but has it ever been heard that in consequence of such use railway companies become bound to cover the openings between the ties so as to make their bridges safe for the passage of footmen? No such obligation arises, for it is the settled rule upon the subject that one who enters upon the premises of another by mere sufferance and permission assumes the risks which arise from concomitant conditions. This proposition is established by the case of *P., F. W. & C. R. R. Co. et al. v. Bingham, Adm.*, 29 Ohio St., 364, where Boynton, J., has

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carefully analyzed numerous cases relating to the subject. Further discussion of it cannot be necessary.

But it is urged that in the circuit court it was thought, and rightly, that the judgment under review was required by the later case of *Harriman v. Railway Co.*, 45 Ohio St., 11. Attention to the facts presented in the cases will show that in the legal view they are materially different. In the present case there has been a recovery because the end of the platform as it had been constructed six years before the accident and maintained without change, was not constructed or guarded so as to make it a safe way for footmen passing from the junction to the village, although such use was not within any invitation which the company extended to the public. While in *Harriman v. Railway Co.*, the recovery was by one who was upon the grounds of the company by permission only, the injury was not occasioned by any real or alleged defect in the construction of the road. The injury there resulted from the operation of the road. The doctrine of the case is that when the company became aware that persons were using the road for purposes of their own it became its duty, not to alter the construction of its road, but to operate it consistently with the facts thus known to it. It was held to be a violation of that duty to add new and further peril to such permitted use without taking precaution against injuries which would naturally result therefrom. Not only does such added peril from the operation of the road appear as a fact in the case, but in the syllabus it is stated as a ground of recovery; and in the opinion the question for decision is stated as follows: "An owner may, without protest or objection, permit his premises to be used by the public so long, in the same condition, that his acquiescence in the continuation of

such use, until some warning or notice on his part, might reasonably be expected; and if under such circumstances and with knowledge of the same, he should place or leave some new, dangerous structure or instrument in the way so used, and from which he might reasonably apprehend danger of injury to those accustomed to such use, can he claim exoneration from liability in case such injury shall occur, on the ground that the law imposed no duty on him to keep his premises in a safe and suitable condition for trespassers and licensees who enter by permission only?" The case therefore recognizes the doctrine of the former case, which we follow here with approval. It follows that there was no evidence tending to show a default of the company in any duty which it owed to Aller, that the instruction given with respect to its duty was not applicable to the case, and the requested instruction upon that subject should have been given. If we had reached a different conclusion upon this question, very serious consideration would be due to the evidence in support of the company's allegation that the injury to the plaintiff below was due to his own negligence, and to the instructions given and requested with respect to the subject of contributory negligence. But that subject need not be considered in view of our conclusion upon the first question. For the reasons stated we adhere to the judgment heretofore entered and announced reversing the judgments of the circuit and common pleas courts.

BURKET, SPEAR and DAVIS, JJ., concur.

CROOKS & CO. v. THE ELDRIDGE & HIGGINS CO.

Breach of contract—Petition to recover purchase price paid for goods—Must show goods of no value—Or reasonable rescission of contract, when—Claim of misrepresentation of goods by sample—Plaintiff's petition must allege, what—Instructions to jury—Measure of amount plaintiff may recover.

1. A petition to recover the whole purchase price paid for goods, must show either that the goods were of no value, or that the plaintiff, within a reasonable time rescinded the contract and restored or offered to restore to the defendant all of the goods purchased, so that the defendant may be put in *statu quo*.
2. A petition in which the plaintiff alleges that he paid to the defendant a certain sum for goods, and also a certain other sum for freight and other expenses connected with the sale and delivery of the goods; and that the goods when delivered to the plaintiff were not as represented and did not correspond to the sample by which the plaintiff was induced to purchase, and also that the goods were unmerchantable, unmarketable and unfit for use, and praying for the recovery of the entire consideration paid and also the money paid in connection with the sale and delivery of the goods, does not state facts sufficient to constitute a cause of action for damages for breach of contract of sale with warranty; and an instruction to the jury that if they were satisfied, by a preponderance of the evidence, of the truth of the facts set forth in the petition, the amount of the plaintiff's recovery should be such amount as the evidence shows the plaintiff paid the defendant for the goods, and the expense incurred in connection therewith, not to exceed the amount claimed in the petition, less the value, if any, of the goods in the plaintiff's possession, is erroneous.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Franklin county.

The facts are sufficiently stated in the opinion.

Harrison, Olds & Henderson, for plaintiff in error.

The plaintiff below was entitled to recover in this action *only*, if at all, upon the cause of action set forth

in the *petition*. *Durbin v. Fisk*, 16 Ohio St., 533. *Ashbrook v. Hite*, 9 Ohio St., 357.

The action is an action for *money had and received*, where the *special circumstances* which are supposed to create the liability, or to raise the promise, to pay back the money sued for, are set forth. *American National Bank v. Wheelock*, 45 N. Y. Sup. Ct., 205.

The use of the common count for money had and received is *not* good pleading in Ohio. *McNutt v. Kaufman*, 26 Ohio St., 127; *Middleport Mills v. Titus*, 35 Ohio St., 253; *Sparrow v. Hosack*, 40 Ohio St., 253.

The law of Ohio is not deficient, but on the other hand it has provided what the remedies of the seller are and what the remedies of the buyer are. The remedies of the buyer, and all of his remedies, are stated in Swan's Treatise (10 ed.), 783-4. Stated in analytic form, but in the exact words of that author, the buyer's remedies are as follows:

1. (a) When the buyer of property is *deceived* in respect to its quality, and (b) there has been an express or implied warranty which covers the defect, he may sue on the *contract of warranty*.

2. (a) If the seller has intentionally and actually deceived the buyer, as to the *quality* of the goods, either by concealment or misrepresentation; (x) it is a *fraud* for which the seller is liable, whether there was a warranty or not; (y) and the buyer may, if he choose, sue (1) *on the contract of warranty*, or (2) for such fraud; if there was both a *warranty* and a *fraud*.

3. (a) When there has been a *special contract* as to *quality* and price of the goods, (b) if the goods delivered do not correspond with the contract, (1) the vendee may repudiate the goods and *return them*; or

(2) he may give notice to the vendor to take them back, after he has given them a reasonable trial; etc.

4. (a) If the goods supplied do not correspond with the contract, (b) *and the vendee retain them*, he may, without having given any notice of their defect, *set up their inferiority as a defense* to an action on the contract; etc.

The action in the case at bar does not fall within the *first, second, third or fourth* of these stated remedies. *Dayton v. Hooglund*, 39 Ohio St., 671. But the buyer cannot, while still retaining the goods, or any part of them, *bring an action to recover the contract price*, or any part thereof, by reason of the total or partial failure of consideration growing out of any inferiority in the goods. The reason of this is, that, if he has paid for the goods he must *return* them to the seller and thus put him in the position he was before the contract of sale was entered into. Keener on Quasi-Contracts, p. 129; *Steele v. Sanchez*, 80 Iowa, 507; *Coolidge v. Brigham*, 1 Met., 547; *Moyer v. Shoemaker*, 5 Barb., 319; *Lawton v. Howe*, 14 Wis., 241.

A party who would rescind a contract must restore to the other what has been received from him. *Insurance Company v. Hull*, 51 Ohio St., 270. Although there are exceptions to that rule, as stated in the last cited case, yet the case at bar does not fall within either the terms, reason or spirit of either that case or the case of *Bebout v. Bodle*, 38 Ohio St., 500, both of which are recognized exceptions to that general rule. This rule is also recognized as prevailing in this state by the case of *Beresford v. McCune*, 1 C. S. C. R., 50. Nor is the case at bar within the decision in *Creighton v. Comstock*, 27 Ohio St., 548.

That money paid on a contract by a vendee cannot be recovered back by him unless there is a *rescission*

of the contract, was, in effect, held in *Ashbrook v. Hite*, 9 Ohio St., 357; *Reed v. McGrew*, 5 Ohio, 375; *Taylor v. Browder*, 1 Ohio St., 225; *Railroad Co. v. Steinfeld*, 42 Ohio St., 449.

There was no pretense of any *return* of the sugar, either to the seller or Kiser & Co., as the seller's agents. The only pretense, if it amounts to such, is of an *offer* to return, which, whatever it was, was made to Kiser & Co., as the resident agents of the seller. The rule, or, at least, the better rule appears to be that when the parties reside in the *same* locality, an *actual return*, and not simply an offer to return, must be made; but where the buyer and seller reside in *different* localities and they are dealing directly with each other, an offer to return is sufficient. *Kauffman Milling Co. v. Stuckey*, 37 S. C., 7.

The rule is the same even if the goods were bought by sample and did not correspond thereto, or, if bought with a collateral contract of warranty which was not fulfilled. *Fewell v. Deane* (S. Car.), 22 S. E.; 43 S. Car., 257; *Hoffman v. Hampton* (1895), 65 N. W., 322; 96 Iowa, 319; *Bank v. Skinner* (Idaho), 43 Pac. Rep., 679; *Lynch v. Curfman* (Minn. 1896), 68 N. W. Rep., 5.

Such offer must be definitely an *offer to return*, and *unconditionally* such. *Leslie v. Evans, Van Epps & Co.*, 1 Clev., 273 (1878).

The right to return goods sold by sample, as not being equal to the sample, is a right to return all or none. *Telford v. Albro*, 60 Ill. App., 359.

The vendee under a contract of sale which is executory and entire cannot repudiate it in respect to a part of the goods and at the same time enforce it in respect to the remainder. *Crane Co. v. Columbus*

Const. Co. (C. C. A.), 73 Fed., 984; *Harzfeld v. Converse*, 105 Ill., 534.

A party cannot affirm a contract in part, and rescind it as to the residue. *Wolf v. Dietzsch*, 75 Ill., 205.

He who has been induced to part with his property, by fraudulent representations or false pretenses on the part of the purchaser, may avoid the contract, and claim the return of his property. But the seller *must act promptly*; upon discovering the fraud, and he *must return, or offer to return, whatever he has received upon it*. Swan's Treatise (10th ed.), 773; *Frost v. Lowry*, 15 Ohio, 200.

Even if the pretended offer to return *a part* of the goods existed in point of fact, as we insist it did not, and was good as an offer to return, as we insist it was not, then we insist that the plaintiff completely *waived any warranty* there may have been in the sale of the sugar and all rights which it may have had by reason of such warranty. *Byers v. Chapin*, 28 Ohio St., 300; 10 Am. & Eng. Encyc., p. 108; *Thompson v. Libby*, 35 Minn., 443; *Dounce v. Dow*, 64 N. Y., 411; *Morehouse v. Comstock*, 42 Wis., 626; *Locke v. Williamson*, 40 Wis., 377; *Prickett v. McFadden*, 8 Ill. App., 197; *Barton v. Kane*, 17 Wis., 38; *Cream City Glass Co. v. Friedlander*, 84 Wis., 53; Benjamin on Sales (6th ed.), Sec. 703; *Muller v. Eno*, 3 Duer (N. Y.), 421; *Reed v. Randall*, 29 N. Y., 358; *Pierson v. Crooks*, 115 N. Y., 539.

There is no averment in the petition that the plaintiff had not inspected the sugar at the time it was received and paid for, and so the testimony of Higgins tending to show that the plaintiff had not so inspected the sugar and did not know its kind or quality and that it did not correspond to the quality of

sugar bought, was entirely incompetent. The plaintiff was not entitled to make proof of those matters except it had been alleged as part of the plaintiff's cause of action. It was not so alleged. *Ogden v. Beatty*, 137 Pa. St., 197.

T. E. Powell, for defendant in error.

The facts stated in the petition justified a recovery by the plaintiff below from the defendant upon the following grounds:

1. There was a special contract as to the quality of the goods sold.

2. The goods delivered did not correspond with the sample or comply with the terms of the contract.

3. There was an implied contract that the sugar was a merchantable and marketable article.

4. The rule is that where goods are sold by sample, and on the faith of that sample a purchase is made, there is an implied warranty that the sample upon which the contract is made is a fair specimen of the goods.

5. Upon the facts stated in the petition it is substantially averred that there was a warranty as to the quality of the sugar sold. No particular form of words is necessary to make a warranty, though the word warrant is generally used. *Swan's Treatise*, 18th ed., p. 830; *Parmlee v. Adolph*, 28 Ohio St., 10; 19 Johns., 290.

The evidence in the case fully justified the verdict. It was established beyond controversy that the sugar could not be used for any ordinary purpose, and as an article of commerce had no merit or value whatever. The sugar contained a large quantity of Prussian Blue, and whenever the sugar was used this coloring matter would instantly appear and discolor anything in which the sugar had been placed.

It is expressly averred in this petition that there was no consideration for the money paid to the defendant below. That the sugar delivered for which the money was paid was worthless, unmarketable, unmerchantable, unfit for use, and did not correspond to the sample upon which it was sold. *King v. Hutchins*, 28 N. H., 561; *Condon v. Perry*, 13 Gray, 5; *Leach v. Tilton*, 40 N. H., 473; *Fulton v. Insurance Co.*, 23 N. Y. S., 598.

DAVIS, J. The Eldridge & Higgins Company filed its petition in the court of common pleas, complaining, after formal averments, of Robert Crooks & Company, as follows:

"That the said defendant is indebted to the plaintiff in the sum of \$1,012.56, which indebtedness was created and arose in the following manner, to-wit:

"On the 20th day of March, 1896, the said plaintiff paid to the said defendant the sum of \$912.56 for 187 bags of granulated sugar containing 100 pounds each, and also \$100.00 for freight and other expenses connected with the sale and delivery of said sugar.

"The said plaintiff further says, that the said 187 bags of sugar, when delivered to the plaintiff, was not as represented and did not correspond to the sample by which the plaintiff was induced to purchase the said sugar, and from which the said sale was made. The said sugar was also unmerchantable and unmarketable and unfit for use, and did not correspond to the sample exhibited to the plaintiff at the time of the purchase of the same.

"Wherefore, the plaintiff says, that there was no consideration for the payment of the said sum of \$1,012.56, and the said plaintiff is entitled to recover the said sum of \$1,012.56 from the said defendant.

"Wherefore, the plaintiff prays judgment against the said defendant for the said sum of \$1,012.56, and its costs herein expended."

The answer was a general denial.

The relief sought in this petition was not the recovery of damages, and the petition does not state facts sufficient to constitute a cause of action for damages. The contract between the parties is not set out, nor is the precise nature of the representations or warranty by the defendants, if any, alleged, nor the breach thereof. Professedly the action is for the recovery of the purchase money paid for 187 bags of granulated sugar, and the basis of the plaintiff's claim is that the sugar was "unfit for use," that is, of no value, and "that there was no consideration" for the payment of the money sought to be recovered. To sustain a recovery for the plaintiff under this petition, the plaintiff must show that the sugar was entirely worthless. If the sugar was proven to have any value whatever, the plaintiff could not recover the price paid for it without rescinding and averring and proving that it made, or offered to make, restitution of the entire lot of sugar purchased, within a reasonable time. 19 Encyclopaedia Pl. and Prac., 71. There was no such allegation in this petition, and the proof was that the lot of sugar purchased was 250 bags, instead of 187 bags, and if any offer to return was ever made it was for no more than 187 bags. As there was no amendment or suggestion of amendment before or after verdict, by far the largest part of the evidence embodied in the record was incompetent, under the issues. The trial court seems to have, in part, comprehended this, when the jury were instructed that "the plaintiff can only recover, if at all, upon proof of the special matters alleged in the petition. He can-

not recover in this action upon any matters which are outside of the special matters alleged in the petition." And yet the court, not only did permit testimony to be given upon matters outside of the special matters alleged in the petition, but, without ordering an amendment of the petition, still further instructed the jury that if satisfied, of the truth of the facts set forth by the plaintiff in its petition by a preponderance of evidence, "the amount of its recovery should be such amount as the evidence shows plaintiff paid the defendant for said 187 bags of sugar, and the expense incurred in connection therewith, not to exceed the sum of \$1,012.56, less the value, if the evidence shows there is any value, of the 187 bags of sugar, now in plaintiff's possession."

This charge is distinctly broader than the claim set forth in the petition. Under the petition the plaintiff could only recover the price paid for the sugar, if the sugar was proved to be worth nothing; but under the charge, the plaintiff might recover the difference between the contract price for the sugar and expense incurred in connection therewith, and its actual value, not to exceed \$1,012.56, that is, general damages, being the difference between the contract price and the actual value of the sugar, and special damages, being the expense incurred in connection with the sugar. This charge was not applicable to the case made in the pleadings. It is evident that the jury made up their verdict upon the measure of damages thus given to them by the court; for if they had found that the sugar was of no value at all their verdict must have been for the plaintiff for the full amount paid for the sugar, which it was not. But having found that the sugar had some value the jury must

neecessarily have found for the defendant under the issues as made up and not amended. The court, however, required the jury to return a verdict for damages which were not claimed in the petition. In fact the common pleas court seems to have tried this case on the theory that it was a case for damages, although the jury were emphatically instructed that the plaintiff could recover only upon the special matters alleged in the petition. In this we think there was substantial and prejudicial error.

It may be added that this instruction did not give to the jury the true rule of damages. If the jury should have been instructed to compute damages at all, under the pleadings in this case, the measure of damages would be the difference between the value as represented and the actual value of the sugar, together with any special damages which might be alleged and proven. The measure of damages given by the court was the difference between the contract price and the actual value of the sugar, not to exceed the entire purchase price, and freight paid, which freight was claimed in the petition, but not distinctly and properly alleged as special damages. .

The judgment of the court of common pleas and the judgment of the circuit court affirming it are

Reversed.

SHAUCK, SPEAR and BURKET, JJ., concur. MINSHALL, C. J., being absent, did not sit in the case.

CHENEY v. THE MAUMEE CYCLE COMPANY ET AL.

Receiver for insolvent corporation—"For all the property and assets," etc.—Order of appointment embraces real estate, when—Mortgage of realty not delivered to recorder before receiver appointed not a lien against receiver, when—Assets of such realty go to general creditors.

1. An order appointing a receiver for an insolvent corporation which in terms makes him "receiver for all the property and assets of the company, of every kind and description, wherever located," is sufficiently broad to embrace the real estate of the corporation, and is not invalid as respects such real estate because of the fact that the petition and motion in the case in which the order is made do not in terms refer to real estate, but, allegations otherwise being sufficient, prays "that the court will appoint a receiver to take charge of all the property and assets of the company."
2. A mortgage of real property which has not been delivered to the recorder of the proper county for record before the appointment of a receiver for the property of the mortgagor, is not a valid lien upon the property as against the receiver, and the receiver, for and in the interest of general creditors, is entitled to the proceeds of sale of such mortgaged premises in preference to the mortgagee.

-(Decided March 12, 1901.)

ERROR to the Circuit Court of Lucas county.

Plaintiff's action was brought in the common pleas of Lucas to foreclose a mortgage given to him by the Maumee Cycle Company, January 14, 1896, to secure the payment of a note for \$6,266.00 due in two years with interest. The mortgage covered lands in Toledo on which was situate the factory building of the defendant Company, and was filed for record in the recorder's office July 30, 1898. Titus B. Terry, receiver, and the First National Bank of Toledo, were made defendants. Terry filed answer and cross-petition.

By the record in this case and in No. 6795, between the same parties, it appears that on June 15, 1898, the defendant bank recovered a judgment against the Company for \$3,309.62 and that an execution that day issued was levied by the sheriff upon the personal property of the Company, consisting of all the machinery, manufactured and unmanufactured stock, being substantially all the tangible personal property of the corporation and necessary in the transaction of its business, and the sheriff took possession of the same. The Cycle Company was at the time insolvent. Afterwards, but upon the same day, the bank filed a petition for the appointment of a receiver, setting up its judgment and execution, the levy thereof; that the Company is indebted to the bank and other creditors to the sum of \$27,000.00 and upwards; that it is unable to meet its obligations as they mature and is insolvent; that if its business can be temporarily continued and its property kept together, to the end that it may be sold as a going concern more can be realized therefrom than in any other way, and if the property is allowed to remain in the hands of the sheriff and be sold on execution the same will be sold at a great sacrifice and the good will of the business as a going concern destroyed, to the damage of all the creditors of the corporation, and praying that a receiver be appointed to take charge of all the property and assets of the Company and to carry on the business until such time as the same can be sold for the benefit of the creditors, and that the property, assets and good will may be ordered sold, etc., etc. Thereupon, on due notice to the defendant Company and by its consent, a receiver was appointed and ordered to take charge of all the property and assets of the Company of every kind and description, wherever located, to col-

lect outstanding debts, etc., to carry on, conduct and manage the business of the Company, etc., subject to further order. The sheriff was ordered to turn over to the receiver all the property levied on by him, which was done, and all the property of the Company, including the said factory building, machinery and real estate, passed into the possession of the receiver and so remained until sold as hereinafter stated.

On November 22, following, the plaintiff, Cheney, having become a party, filed a motion to vacate and set aside the order of appointment, and the discharge of the receiver, on the ground that the petition was not sufficient to authorize the appointment of a receiver and that the court had no jurisdiction to appoint the receiver. Cheney was, at the time the receiver was appointed, and continued to be, a director of the Company and its president, owning one share of stock and was a creditor by reason of his note and mortgage. The motion was overruled to which proper exception was preserved.

Under the order of the common pleas a sale of the premises was made and the proceeds brought into court for distribution. Trial was afterwards had in the common pleas and from its judgment an appeal was taken to the circuit court whose judgment is brought by the plaintiff to this court for review.

Seney & Johnson, for plaintiff in error.

If "all the property and assets of every kind and description wherever located" should be construed to include the real estate, the order thus made by the court would be void for want of jurisdiction, in so far as it embraced the real estate, for the reason the subject matter, viz., *real estate*, was not brought before the court by any statement or claim of the par-

ties. *Spoors v. Coen*, 44 Ohio St., 497; 20 Am. and Eng. Enc. of Law, pages 83, 100, 327; Beach on Receivers, Sec. 508; *Crow v. Wood*, 13 Beavan's Reports, 273.

Hence we insist that the receiver in this case was never appointed over the real estate upon which the mortgage was given, and hence the mortgage is the first best lien upon the premises, notwithstanding it was not filed for record until after the appointment of the receiver.

For it again must be borne in mind that a receiver with such limited powers is solely and alone a representative of the corporation, and no one else. This unrecorded mortgage thus being clothed by being recorded before the receiver had any additional powers, viz., to represent creditors upon the order being obtained to sell the property for their benefit, it thus became by being recorded a legal lien upon the property, not only valid against the corporation but against every one else. Smith on Receivership, Sec. 62, page 145; *Ib.* Sec. 38, pp. 112, 113; *Matthews v. Cooper*, 49 N. Y. S. R., 792; *Van Rown v. San Francisco*, Sup. Ct. 58 Cal., 358; *Davis v. Bonney*, 89 Va., 755; Smith on Receivership, part —, Sec. 44, page 126; *Bank v. Bank*, 106 U. S., 236; Smith on Receivership, Sec. 59, page 142; Sec. 67, page 149; *Gill v. Pinney's Admr.*, 12 Ohio St., 38; *Montgomery v. Merrill*, 18 Mich., 338.

It was urged in the court below and it appeared to have considerable force in that court that the receiver was entitled to this fund as against the mortgage of the plaintiff, for the reason that the mortgage was not left with the recorder for record before the receiver was appointed, and this by virtue of Section 4133 of the Revised Statutes.

If what we have attempted heretofore to impress upon the court as the reason why the decree of the circuit court should be reversed should avail nothing, we still maintain that this section of the statute has no application to the case at bar, and that the decree of the circuit court should be reversed on well-known equitable principles. Beach on Receivers, Sec. 324; *Stansell v. Roberts*, 13 Ohio, 148, 155; *White v. Denman et al.*, 1 Ohio St., 110; *Fosdick v. Barr*, 3 Ohio St., 471; *Bloom v. Noggle*, 4 Ohio St., 49; *Betz v. Snyder*, 48 Ohio St., 492; *Wright v. Bank*, 59 Ohio St., 80.

Smith & Beckwith and *R. S. Holbrook*, for defendant in error, Titus B. Terry, receiver.

The general rule relative to the form of orders appointing receivers is laid down in High on Receivers, Sec. 87; Beach on Receivers, Sec. 508.

It is familiar practice that orders appointing receivers for large manufacturing plants, railways and other similar properties, describe the property placed in the hands of the court in general terms, and that no particular nor definite description of the real estate over which said receivers are so appointed is ever made in such orders. The same is also true of the form of deeds of assignment. *Bank v. Werk*, 9 Dec. (Re.) 770 (17 B. 124); *Barton v. Morris*, 15 Ohio, 408.

But there is another aspect of this case which also renders plaintiff's position relative to the insufficiency of the order appointing the receiver wholly untenable. At the time of the appointment of such receiver, the Maumee Cycle Company was insolvent and had ceased to prosecute the objects for which it was created. Hence under the principles laid down so clearly and emphatically by this court in the case of *Rouse v.*

Bank, 46 Ohio St., 493, "the rights of the creditors" of such company, thereupon, "became fixed instantly and equally." Its property then became a trust fund for such creditors, a fund in which their equities were equal. *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. Rep., 8.

In view of the foregoing, we submit—

1. That the order of the court appointing the receiver herein was sufficient by its terms to include the real estate of the defendant company.

2. That such order and the possession taken thereunder by the receiver of the real estate of the defendant, was clearly sufficient as against the plaintiff, a director and president of such defendant.

3. That the insolvency of the company and its failure to perform its corporate functions immediately impressed all its property with a trust for the equal benefit of its creditors and vested the court with complete jurisdiction over the same, to the exclusion of any creditor seeking to assert a preferential lien thereon.

Cases involving the construction of statute as applied to unrecorded mortgages have been brought before this court in almost every conceivable form, and in all such cases a uniform line of decisions has been rendered, holding substantially that while unrecorded mortgages are good and effectual between the parties, they are "entirely nugatory as to third parties, both at law and in equity, until they are recorded." *Fosdick v. Barr*, 3 Ohio St., 471, and earlier cases cited; *Bloom v. Noggle*, 4 Ohio St., 45; *Erwin v. Shuey*, 8 Ohio St., 509; *Betz v. Snyder*, 48 Ohio St., 492.

This brings us to a brief consideration of the character and functions of a receiver. *Bank v. Bucking-*

ham, 12 Ohio St., 419; *Railway Co. v. Sloan*, 31 Ohio St., 1; High on Receivers, Sec. 5.

The receiver, while representing the court appointing him, likewise represented the creditors of the company, substantially the same as an assignee.

While it is true that there are no decisions in our own state covering this exact point, yet we are favored by recent decisions of the courts of other states, which clearly establish the principle for which we contend. They are briefly as follows, viz.: *Hebberd v. Land & Cattle Co.*, 55 N. J. Eq., 18; *Graham Button Co. v. Spielmann*, 50 N. J. Eq., 120; *Wilcox & Howe, In re*, 70 Conn., 220; *Bayne v. Brewer Pot. Co.*, 90 Fed., 754; *Farmers Loan & Trust Co. v. Minneapolis*, 35 Min., 543; High on Receivers, Sec. 454; Smith on Receivers, Sec. 231.

SPEAR, J. The case having been fully and adequately reported by the circuit court (20 O. C. C., 19), opinion by Haynes, J., but little more is necessary here than to state the conclusions to which this court has arrived.

The questions arising upon the record are: Did the order of the court that appointed the receiver include the real estate of the defendant Company? And if it did, is the receiver entitled to the funds arising from the sale of the mortgaged property in preference to the mortgagee by reason of the fact that the mortgage, though executed before the appointment of the receiver, was not delivered to the recorder for record until after such appointment?

1. Objection is made to the sufficiency of the order to embrace the real estate because neither the petition nor the motion on which the receiver was appointed describes or refers to real estate. True it is that real

estate is not specifically mentioned in either the petition or motion, but the petition, having set forth adequate grounds for the appointment, including the allegation that if the personal property seized in execution, being all the personal property and assets, should remain in the hands of the sheriff and be sold under the writ, the good will of the business as a going concern would be destroyed (thus showing that it was no longer able to carry on its business), prays that the court will appoint a receiver to take charge of all the property and assets of the Company. Then follows the order making the appointment of a receiver for all the property and assets of the Company, of every kind and description, wherever located. He was thereupon authorized to collect debts, to conduct and manage the business heretofore carried on by the Company, etc., etc. The defendant Company, and all persons having any property belonging to it, were ordered to surrender the same to the receiver. Thereupon the receiver, having qualified, proceeded to take possession of all the property of the Company of every kind and description, including real estate, and to further carry out the order of the court. All this was done with the full knowledge and consent of the Company, and without any suspicion of fraud or improper practice. How could a creditor of the Company be heard afterward to object? Most of all, how could the president of the Company be heard? We think he could not. The petition sufficiently describes, and the order sufficiently includes, the property sought to be subjected to the jurisdiction of the court, and satisfies the rule that the order should distinctly state over what property the receiver is appointed in order that persons dealing with him may know what property is in possession of the court by its officer. (High

on Rec., sec. 87.) It is *all* the property. Nor is the validity of the order affected by the fact that the petition does not specifically refer to real estate. Even though it be defective for lack of fullness of statement, such defect would be cured by the appearance and consent of the Company. (High on Rec., sec. 86.) The order is as full and definite as is usual in orders appointing receivers for railways, large manufacturing concerns, and the like, and as full as many deeds of assignment and other conveyances which have been sustained by the courts. High on Rec., sec. 453; *Barton v. Morris*, 15 Ohio, 408; *Bank v. Werk*, 17 W. L. B., 174. Slight imperfections in the pleadings, or irregularities in the proceedings, if they exist, become unimportant in view of the well established general rule that the property of an insolvent corporation which has ceased to do business, and to carry out the objects of its creation, constitutes a trust fund for the equal benefit of its creditors, and the conclusion which inevitably follows that, upon the filing of the petition and service on the corporation and its answer admitting the truth of the charges and consenting to the granting of the prayer, the court's jurisdiction attached to all the property of the corporation, and its power to administer it for the benefit of all the creditors was complete. *Rouse v. Bank*, 46 Ohio St., 493; *Belmont Nail Co. v. The C. I. & S. Co.*, 46 Fed. Rep., 8.

2. It is to be noted that the mortgage, though executed months prior to the commencement of the action, was not delivered to the recorder for record until July 30, 1898, forty-five days after the appointment of the receiver. The distinct provision of section 4133, Revised Statutes, being that "All mortgages * * * shall take effect from the time the same are delivered

to the recorder of the proper county for record," it would follow that this mortgage could not operate as a lien to affect the rights of creditors prior to the above date, nor, as against the receiver, provided the receiver represents the general creditors. That an assignee by virtue of a general assignment for the benefit of creditors so represents creditors, and that a mortgage of real property, not deposited with the recorder for record until after the taking effect of the assignment, creates no lien as against the assignee and the creditors, is distinctly held in *Betz v. Snyder*, 48 Ohio St., 492. The relation of an assignee and a receiver to the property of an insolvent debtor is in many respects similar. The one obtains title to and authority and power over the property by reason of the joint act of the debtor and the court; the other obtains a like authority by the act of the court alone, not having the title, but standing as the ministerial officer of the court, his relation to the property being much like that of a sheriff or master in chancery. *Bank v. Buckingham*, 12 Ohio St., 419. His appointment is an equitable remedy, bearing the same relation to courts of equity that proceedings in attachment bear to courts of law, the appointment being treated as an equitable execution. The purpose is to secure the means for satisfying the final order and judgment of the court in the action, and the effect of the seizure is to place the property seized in the custody of the court. *Railroad Co. v. Sloan*, 31 Ohio St., 1. By express provision of section 5590, Revised Statutes, the receiver is given power, under the control of the court, to take and keep possession of the property, and generally to do such acts respecting the property as the court may authorize. This statutory provision establishes a legal right, and this legal right is not affected by the

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fact that it is conferred in an action in its nature equitable, nor by the fact that it is to be enforced against a claim which would have been good as between the claimant and the debtor. It follows from this that the effect of the appointment, and the seizure of the property by the receiver, was to fasten the claims of creditors upon it and to give that officer control over it for the benefit of creditors, and in this respect his relation to it was, for all practical purposes, the same as that which an assignee would have had. The property thus sequestered was held by the receiver as effectually as an assignee could have held it, or as creditors could have held it by attachment or levy. In no other way than through him could the rights of creditors be worked out, and, in this aspect of the case, he represented the creditors rather than the debtor. *Graham Button Co. v. Spielmann*, 50 N. J. Eq., 120; *Hebberd v. S. L. & Cattle Co.*, 55 N. J. Eq., 18; *In re W. & H. Co.*, 70 Conn., 220; *Farmers' L. & T. Co. v. M. E. & M. Works*, 35 Minn., 543; *Bayne v. Brewery Pottery Co.*, 90 Fed. Rep., 754; High on Rec., Sec. 454; Smith on Rec., secs. 230, 231.

We think that, upon principle as well as upon the above authorities and many others of like import which might be cited, the right of the receiver to the property in dispute was a legal right to its possession with authority to manage it and dispose of it for the benefit of creditors generally; that it antedated the taking effect of plaintiff's mortgage, and that, therefore, as between the plaintiff and the receiver, the proceeds of the sale belong to the latter.

We find no error in the record in this case nor in case No. 6795, and both judgments will be

Affirmed.

MINSHALL, C. J., and WILLIAMS, BURKET, DAVIS
and SHAUCK, JJ., concur.

THE STATE OF OHIO EX REL. HASBROOK v. LEWIS, AUDITOR OF HAMILTON COUNTY.

THE STATE OF OHIO EX REL. WEBER v. LEWIS, AUDITOR OF HAMILTON COUNTY.

Decennial board of equalization—Receives in due time, from county auditor, returns of district assessors—And acts under section 2814, Rev. Stat.—Board thereby acquires jurisdiction of equalizing valuations—Board may exercise discretion—Not controlled by court—County auditor must transmit to state auditor returns of district assessors as passed upon by equalization board—County auditor bound by same—Conceded facts prevail over general allegation—Pleading.

1. Where the county auditor, in due time, lays before a decennial board of equalization, the returns made by the district assessors, and such board thereupon proceeds to act upon such returns for the purpose of equalization under section 2814, Revised Statutes, it thereby acquires jurisdiction of the subject matter of equalizing such valuations of real property, and such jurisdiction will continue to the completion of the work of such board, even though the board considers matters not named in the statute; the essential requirement being, that the board shall raise or reduce the valuation of each tract or lot of real property, to such an amount as, in the opinion of the board, shall be the true value thereof in money.
2. Such decennial board is free to form such opinion as to valuation, under the sanction of an official oath, and such opinion cannot be controlled by a court or an officer.
3. Such decennial board having raised or reduced the valuations of real property to such an amount as in its opinion is the true value thereof in money, it is the duty of the county auditor to make out and transmit to the auditor of state, a proper abstract as returned by the several district assessors, together with such additions as have been made thereto; and the county auditor has no authority to omit such additions.

(Decided March 12, 1901.)

PETITION in Mandamus.

The petition on relation of John A. Hasbrook is as follows:

"The relator, John A. Hasbrook, says that he is the owner of real estate in Sycamore township, Hamilton county, and a taxpayer of said county; that Eugene L. Lewis is and was on the fifth day of November, 1900, the duly elected and qualified auditor of Hamilton county, Ohio; that the question involved in this action is one of a common or general interest of many persons, who are similarly situated and who are very numerous and that it is impracticable to bring them all before the court; and that by virtue of said office it was the duty of said auditor on or before the first Monday of November, 1900, to make out and transmit to the auditor of state an abstract of the real property of each township in said county, setting forth:

"First. The number of acres, exclusive of town lots, returned by the several assessors of his county, with such additions as have been made thereto.

"Second. The aggregate value of such real property, other than town lots, as returned by the several assessors of his county, inclusive of such additions as had been made thereto.

"Third. The aggregate value of the real property in each township of his said county, as returned by the several assessors, with such additions as had been made thereto.

"The relator further says that said defendant, on or about the fifth day of November, 1900, did make out and transmit to the auditor of state a pretended abstract of the real property of each township in said Hamilton county, in which pretended abstract he purported to set forth the number of acres exclusive of town lots, returned by the several assessors of said county of Hamilton with such pretended additions as had been made thereto; and the aggregate value of such real property, other than town lots as returned

by the several assessors of said county, inclusive of such pretended additions as had been made thereto; and the aggregate value of real property in each township of said county as returned by the several assessors, with such pretended additions as had been made thereto.

“And the relator further says that the abstract so made out and transmitted by the defendant, auditor aforesaid, to the auditor of state, was illegal, invalid and void, because of the additions made to the valuation of the real property in said county, by the decennial county board for the equalization of the value of the real property, within the county of Hamilton, exclusive of the city of Cincinnati, which city is a city of the first grade of the first class, for the reasons following, to-wit:

“The decennial county board of equalization for the said county of Hamilton, which was duly appointed and qualified, and consisting of said defendant, county auditor as aforesaid, the county surveyor and the county commissioners, did not, in the performance of its duties prescribed by the statute, proceed to equalize the valuations laid before said board by the defendant, auditor of said county of Hamilton, of the returns made by the district assessors of said county, with the additions which he had made thereto, so that such tracts or lots of land in said county should be entered on the tax list at their true value, and did not observe the rules prescribed by the statute, requiring them:

“First. To raise the value of such tracts and lots of real property as, in their opinion, had been returned below their true value, to such price or sum as they believed to be the true value thereof, agreeable to the rules prescribed for the valuation thereof; and

"Second. To reduce the valuation of such tracts and lots as, in their opinion, had been returned above their true value, as compared with the average valuation of the real property of said county of Hamilton, having due regard to their relative situation, quality of soil, improvement, natural and artificial advantages, possessed by each tract or lot.

"But the relator says that on the contrary the said decennial county board of equalization in utter and entire disregard and violation of its duty as prescribed by the statutory rules, proceeded to and did illegally and arbitrarily add to the valuation of the returns made by the said district assessors amounting in said county of Hamilton, exclusive of Cincinnati township, in the aggregate to \$2,224,770, by entirely ignoring, rejecting and disregarding said returns of said district assessors and by improperly taking and assuming as the basis of said valuation the tax list and duplicate of the valuation of real property in said county of Hamilton for the year 1899 and adding thereto, without regard to the true valuation of any lot or tract of land, a sum which amounted in the aggregate to \$700,700; that said county board of equalization, instead of following any of the statutory rules prescribed for the valuation of real property, so as to cause a just and equitable equalization of the values thereof, as required by law, either from actual view or from the best sources of information within their reach, entirely neglected to view any of the several lots and tracts of land in the several townships in said county of Hamilton outside of the city of Cincinnati, or to obtain and use any information in regard thereto; but on the contrary appointed a number of clerks to the number of about forty, and under the advice, instruction and supervision of said defendant, county auditor

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as aforesaid, placed before them, said clerks, the tax duplicate of real property in said townships for the year 1899 and instructed them to disregard and ignore the returns of the district assessors and to add to the values as they appeared upon said duplicate of 1899; that said clerks acted upon said instructions and did indiscriminately, arbitrarily and without exercise of any judgment or knowledge of the values, add to the valuations as they appeared upon the tax duplicate of real property for said year 1899; that said clerks were directed by said board and said auditor not to reduce or cause any reduction to be made from said valuations of said duplicate of 1899; that no reductions were in fact made; that no equalization of values, as required by law, were in fact made or attempted to be made, and that the values as they appeared on the abstract of said county auditor so transmitted as aforesaid, to the said state board of equalization, were made up by said clerks adding sums indiscriminately and without rule, examination or judgment to said valuations as they appeared upon said tax duplicate for the year 1899; that said board did not, collectively or otherwise, visit, examine or view any of the tracts or lots of land in said townships or attempt in any other way, than as hereinbefore described, to ascertain the values to be placed, under the rules prescribed by law, upon the several tracts and lots of land in said townships; that said board, at the completion of the labors of said clerks, accepted the work of said clerks as the action of said board for the equalization of the valuations of said tracts and lots of land; and that said result and conclusion were accepted by said defendant, county auditor, as aforesaid, with full knowledge of the manner in which the same had been reached, and were, in violation of his duty

as said auditor, transmitted to said state board as a true abstract of the valuations of tracts and lots of land in the several townships of Hamilton county.

"Whereby, in reaching said conclusion and result, in the manner and by the means aforesaid, said board did not raise the valuation of such tracts and lots of real property in said county as, in its opinion, had been returned below its true value, to such price or sum, as, in its opinion, had been returned below their true value, to such price or sum, as they believed to be the true value thereof; agreeably to the rules prescribed for the valuation thereof; nor did they reduce the valuation of such tracts or lots, as, in their opinion, had been returned above their true value, as compared with the average valuation of the real property of said Hamilton county, having due regard to their relative situation, quality of soil, improvement, natural and artificial advantages possessed by each tract or lot; but, on the contrary, illegally and arbitrarily increased said valuations, amounting in the aggregate to the sum of \$2,224,770 aforesaid.

"And the relator further says that the said decennial county board of equalization did not equalize the valuations of the real property of said county of Hamilton, as shown by the returns of the said district assessors, so that each tract and lot of real estate contained in said county, was entered on the tax list at its true value.

"And the relator says that the said defendant, Eugene Lewis, as such auditor of Hamilton county, aforesaid, in violation of the duty, specially enjoined upon him by law, resulting from his said office, made out and transmitted to the auditor of state, an abstract of the real property of each township of said county of Hamilton, including and containing said invalid,

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illegal and void additions so made by said decennial county board of equalization, and has neglected, failed and refused, and still neglects, fails and refuses to make out and transmit to the auditor of state, an abstract of the real property of each township in said county of Hamilton, of the returns made by said district assessors, without the additions so illegally made by said boards.

"And the relator says that, by the ordinary course of the law, he has not adequate remedy against the said Eugene Lewis, auditor aforesaid, for his said neglect, failure and refusal.

"The relator therefore prays that the defendant, Eugene Lewis, auditor of Hamilton county aforesaid, may be compelled to make out and transmit to the auditor of state an abstract of the real property of each township of Hamilton county, as made by the district assessors of said county, without the additions made thereto, by said decennial county board of equalization, by a mandamus from this court; that an alternative writ of mandamus may first issue, requiring the defendant to show cause, by a day to be named therein, why he does not do so; that on final hearing a peremptory writ of mandamus may be awarded to compel the defendant to make out and transmit said abstract; and that he may have such other and further relief as the nature of the case may require."

The petition on the relation of George Weber, complains against the auditor, as to the acts of the decennial city board of equalization of the city of Cincinnati, and it is in substance the same as the above petition, except that instead of the averments as to the acts of the county board of equalization employing forty clerks, etc., there are substituted averments as

to the acts of the decennial city board of equalization as follows:

"But the relator says that, on the contrary, said decennial city board of equalization, in utter and entire disregard and violation of its duty as prescribed by said statutory rules, proceeded to, and did, illegally and arbitrarily and not from actual view or from the best sources of information within their reach as required by law, add to the valuation of the returns made by the said district assessors, amounting in said city of Cincinnati, in the aggregate to \$21,304,460, but acting under the advice and direction of said defendant county auditor and as aforesaid, by ignoring and rejecting and disregarding said returns of said district assessors, and by taking and assuming as the basis of said valuation, the tax list and duplicate of the valuation of real property in said county of Hamilton for the year 1899, and adding thereto without regard to the true valuation of any lot or tract of land, as fixed and returned by the district assessors, a sum which amounted in the aggregate to \$11,002,610. In reaching said conclusion and result, said board did not raise the valuations of such tracts and lots of real property in said city as, in its opinion, had been returned below their true value, by said district assessors, to such price or sum, as, in its opinion, had been returned below their true value to such price or sum, as they believe the true value thereof; agreeable to the rules, etc., nor did they reduce the valuation of such tracts or lots, as in its opinion, had been returned above their true value, by said district assessors, as compared with the average valuation of the real property of said city of Cincinnati, having due regard to their relative situation, improvement, natural and artificial advantages, possessed by each tract

or lot; but on the contrary illegally and arbitrarily increased said valuations over and above the duplicate of 1899 amounting in the aggregate to the sum of \$11,002,610 aforesaid.

"And the relator further says that said decennial city board of equalization did not equalize the valuations of the property of said city of Cincinnati as shown by the returns made by the said district assessors, so that each tract and lot of real estate contained in said city was entered on the tax list at its true value; but on the contrary wholly ignored and rejected the valuation as aforesaid returned by the said district assessors."

The charge of the petition as to the violation of duty by the auditor, is the same in both petitions, and from there on to the end, including the prayer.

The defendant, the county auditor, interposed a general demurrer to each petition.

Foraker, Outcalt, Granger & Prior; Parton & Warrington; George B. Okey and D. F. Pugh, for relators.

We take it to be the settled rule that the powers of officers, such as constitute boards of equalization, under our statute, must be strictly pursued. They have such powers only as are expressly delegated, and such additional incidental powers as may be necessary to carry the delegated powers into effect. *Mix v. People*, 72 Ill., 241; *Webster v. People*, 98 Ill., 343; *Merrill v. Humphrey*, 24 Mich., 170.

In proceedings under statutory authority whereby a man may be deprived of his property, the statute must be strictly pursued and compliance with all its pre-requisites must be shown. *D'Antignac v. Augusta*, 31 Ga., 700; *Sea Isle City v. Board of Assessors*, 50 N. J. L., 50.

Courts of equity have frequently intervened to control and correct the wrongful acts of like officers and boards where they exceeded their authority, or where their duty has been recklessly disregarded, or where they have acted through prejudice, or where their acts have been arbitrary and unreasonable. *Railway Co. v. Cole*, 75 Ill., 591; *Walsh v. King*, 74 Mich., 350; *Brauns v. Green Bay*, 5 Wis., 115; *Cooley on Taxation* (2d ed.), 746 and 784; *Rawson v. Schott*, 7 Circ. Dec.; 256; 14 C. C. R., 94; *Orr v. State*, 28 Pac. Rep., 420.

Equity will enjoin the collection of taxes, upon bank shares valued by a rule different from other personal property. *Pelton v. National Bank*, 4 O. F. D., 573; 101 U. S., 143.

A rule or principle of unequal valuation of different classes of property for taxation adopted by local boards of assessment, is unconstitutional, and equity will enjoin. *Cummings v. National Bank*, 4 O. F. D., 578; 101 U. S., 154; *Grant v. Bartholomew*, 57 Neb., 674; *State v. McClurg*, 27 N. J. L., 253; *State v. Allen*, 43 Ill., 456.

If the acts of the equalization boards were, as we maintain, illegal, null and void, the valuations of the district appraisers, as we have shown by the foregoing citation of authority, remain unaffected, and must form the legal basis, together with the additions and corrections made thereto by the county auditor, of the abstract which he is required, by section 2817, of the Revised Statutes, to transmit to the auditor of state. Hence, it becomes the duty of the defendant, the performance of which may be compelled by mandamus, to transmit such true and legal abstract, as an act which the law specially enjoins upon him as a duty resulting from his office. Section 6741, Revised Stat-

utes; *State ex rel. v. Cornwall*, 97 Wis., 565; *State ex rel. v. Tanzey*, 49 Ohio St., 656.

Gideon C. Wilson, County Solicitor, *Otway J. Cosgrave*, Asst. County Solicitor, *Oliver B. Jones*, Asst. County Solicitor, *J. M. Sheets*, Attorney General, *J. E. Todd*, Asst. Attorney General, *Smith W. Bennett* and *W. M. Ampt*, for defendant.

Our statutes on mandamus (part 3, ch. 2, tit. 4) lay down very clear rules in relation thereto:

1st. Section 6741, Revised Statutes, authorizes the issuance of writ in the name of the state to a person "commanding the performance of an act which the law specially enjoins as a duty resulting from an office."

2d. Section 6744, Revised Statutes, provides that "the writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law," and

3rd. That "It may issue on the information of the party beneficially interested."

1. The duty sought to be enforced must be clearly required by law.

Mandamus will not be issued in the absence of a clear right to the object sought to be obtained by it. *State v. Yeatman*, 22 Ohio St., 546.

Nor to compel an officer to do an act, which it is claimed the law enjoins on him as a duty, unless the existence of all the facts necessary to put him in default be shown. *Cincinnati College v. LaRue*, 22 Ohio St., 469.

If he has any discretionary power the court will not attempt to control it. *State ex rel. v. Comrs. of Shelby Co.*, 36 Ohio St., 326; *State ex rel. v. Moore*, 42 Ohio St., 103; High's Extraordinary Legal

Remedies; *Commonwealth v. Mitchell*, 82 Pa. St., 243; *Dechert v. Commonwealth*, 113 Pa. St., 229; *United States v. Lamont*, 155 U. S., 303; Spelling on Extraordinary Relief, vol. 2, p. 1134; Mechem on Public Officers; *United States ex rel. v. Seaman*, 58 U. S. (17 How.), 225; *United States v. Commissioners*, 72 U. S. (5 Wall.), 563.

2. If relator, individually, or the public at large have been injured by any improper action of the county or city board of equalization, there is a plain and adequate remedy in the ordinary course of law and that being the case, the writ of mandamus will not issue (R. S. 6744).

The scope and power of the board of revision and the object of its creation is well set forth in the recent opinion of this court in *State ex rel. v. Morris*, 45 Bull., 74.

An opportunity being thus afforded for the full consideration of all tax valuations complained of, both in the aggregate and by the individual lots and tracts, before the tribunals established by law for that purpose, the courts will not intervene, especially at this time, to disturb or revise them. *Wagoner v. Loomis*, 37 Ohio St., 571.

In the first place the assessor is required to return the true value of the property. That is one valuation. Then the county board of equalization is required to raise or lower it so as to make its actions show the true value. That is another valuation. Then the state board, acting upon aggregates, raises or lowers the valuations in towns or counties according to their opinion of the true value, giving a third opportunity for corrections. And finally, after action by all these agencies, another review is had by the board of revision. This action of the board of revision

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becomes therefore quite important to the individual property holder in fixing the comparative valuation for his property as related to other property in his county, and is to be had at the sessions of said board, after notice given to taxpayers, so that all may be given proper opportunity for full and complete hearing. If any wrong has been done to relator he can make his application to this board, and have ample opportunity to be heard before it. *State ex rel. v. Morris*, 45 Bull., 74; *Stanley v. Supervisors of Albany*, 121 U. S., 535; *Martin v. Clay*, 56 Pac. Rep., 715 (Oklahoma, 1899).

Nowhere in the petitions is it alleged that the valuations returned by the assessors were the true valuations of said property, nor is it stated, as before said, that the valuations as fixed by the county and city boards do not show the true valuations in the aggregate of such property. *Boyd v. Wiggins*, 54 Pac. 411 (Oklahoma, 1898); *People v. National Bank*, 55 Pac. 685 (Oklahoma, 1898); *Ledoux v. Lavee*, 83 Fed. Rep., 761 (Fla., 1898); *Moody v. City of Galveston*, 50 N. W. Rep., 481 (Ct. Civ. App. Texas).

Boards may generally act upon their knowledge or personal examination or any other information or evidence satisfactory to themselves. This is true where no specific rules are laid down for the method of making valuations. In Ohio there is no requirements that the members of the board of equalization, collectively, should visit or examine the real estate for which the valuation is to be fixed, or that they should take evidence in regard to its valuation. They may fix its valuation from their own knowledge, from their examination, from evidence, or from any other method that they may deem proper and right in determining it. And they may avail themselves of any

means of information they deem necessary. Under this rule it would clearly be within their province to consider the tax duplicate of 1899, as well as any other evidence or information they thought proper or necessary. *Nova Cesarea, etc., Lodge v. Hagerty*, 11 Dec. (Re.) 595; 28 Bull., 67; *Railway Co. v. Comrs. Riley Co.*, 20 Kans., 141; *Knight v. Thomas*, 45 Atlantic, 499, 93 Me., 494; *Brown v. Cinida*, 79 N. W. Rep., 216 (Wis., 1899); *State v. Duluth Gas & Water Co.*, 78 N. W. Rep., 1032; *State of Nevada, ex rel., v. Co. Comrs.*, 14 Nev., 140; *Knapp v. Heller*, 32 Wis., 467.

But if relator should not secure the relief to which he is entitled by the final action of the state board and the board of revision, he still has a right to appeal to the courts under provisions of Sec. 5848, Revised Statutes, which furnishes full opportunity for an adequate remedy in the ordinary course of law.

With this right to relief by injunction subsisting, Sec. 6744, Revised Statutes, forbids the issue of a writ of mandamus.

3. A writ of mandamus can only be issued on the information of a party beneficially interested.

The petition in each of these cases alleges that the relator is the owner of real estate and a taxpayer in Hamilton county, but there is no allegation that the relator is a citizen or an elector of that county. And while he states that the question involved is one of general interest of many persons similarly situated, he does not say he sues in their behalf as under Sec. 5008, Revised Statutes. *State ex rel v. Henderson*, 38 Ohio St., 644.

While the petition alleges that the question involved in this action is one of common or general interest of many who are similarly situated, and who are very numerous, and that it is impracticable to bring

them before the court, relator appears in behalf of his private right, he has made no demand upon any public officer, or made any attempt to bring this proceeding except in his private capacity, and while other taxpayers might have similar complaints as against valuations of their property, it does not follow that they have a common interest in this proceeding. *Weber v. Dillon*, 54 Pac. Rep., 894 (Oklahoma, 1896).

Mandamus will not issue upon the information of a private citizen to secure the enforcement of a purely public duty. *State ex rel. Clark v. Murphy*, 2 Circ. Dec., 190; 3 C. C. R., 332; 25 Maine, 291; *Williams v. Comrs. Lincoln Co.*, 35 Me., 345; *People ex rel. Drake v. University of Michigan*, 4 Mich., 98; *Heffner v. Com. ex rel. Kline*, 28 Pa. St., 108.

BURKET, J. When stripped of their general charges of illegality and violation of statutes, the petitions in substance aver that the decennial board of equalization largely increased the amount of the total returns made by the district assessors, both in the city and county, and that the county auditor has certified the amounts of the returns so made by the district assessors, together with the increase made by the boards of equalization, to the auditor of state, so that the auditor of state has both the amounts as returned by the district assessors, and the increase added by the boards of equalization, and the totals of both added together; and the prayers of the petitions are, that the county auditor be compelled to make out and transmit to the auditor of state the amounts returned by the district assessors, without the additions made thereto by the decennial boards of equalization. It does not at first view clearly and plainly appear in the peti-

tions that the county auditor has transmitted to the auditor of state the totals returned by the district assessors, the additions made thereto by the decennial boards of equalization, and the totals arising from such additions; but taking the petitions by the four corners, and construing them in the light, and with the knowledge, possessed by the court of such transactions, those facts appear with sufficient clearness to take them as true, when testing the sufficiency of the petitions, by a general demurrer.

The ground upon which it is urged that the additions made by the decennial boards of equalization should be withdrawn, is that those boards acted in violation of the statutes prescribing their duties in making the additions, and that the violation of duty was so flagrant as to render their acts not only irregular, but void and of no effect, and being thus void, that the returns of the assessors should stand as if no increase or decrease had been made by the boards of equalization.

The question then comes to this: Were the proceedings of the decennial city and county boards of equalization, in making the additions to the returns of the district assessors, when made in the manner as charged in the petitions, void, or merely irregular? If void the additions should be disregarded, but if only irregular, they must be held to be legal.

The law prescribing the duties of such boards, is section 2814, Revised Statutes, as amended 94 O. L., 246, and which reads as follows:

"Section 2814. The auditor shall lay before the board the returns made by the district assessors, with the additions which he shall have made thereto; and they shall then immediately proceed to *equalize such valuation*, so that each tract or lot shall be en-

tered on the tax list at its true value, and for this purpose they shall observe the following rules:

"1st. They shall raise the valuation of such tracts and lots of real property as, in their opinion, have been returned below their true value, to such price or sum as they may believe to be the true value thereof, agreeably to the rules prescribed by this title for the valuation thereof.

"2d. They shall reduce the valuation of such tracts and lots as, in their opinion, have been returned above their true value, as compared with the average valuation of the real property of such county, having due regard to their relative situation, quality of soil, improvement, natural and artificial advantages possessed by each tract or lot.

"3d. They shall not reduce the aggregate value of the real property of the county below the aggregate value thereof, as returned by the assessors, with the additions made thereto by the auditor, as hereinbefore required."

The rule prescribed by the title to which the above section belongs is found in section 2792, and is that each parcel of real property shall be valued at its true value in money. This is also the rule prescribed by the constitution of the state. Section two of article twelve.

It was therefore the sworn duty of each board of equalization to raise or reduce each parcel of real property to such an amount, as, in *their opinion*, was its true value in money; and no restriction is placed upon the manner of forming that opinion when it comes to *raising* the valuation, only so that it be "to such price or sum as they may believe to be the true value thereof." As the petitions do not complain of any reductions of value, we need not consider the duty

of the board in that regard, but it is sufficient to say that the duties prescribed are merely directory, and the statute provides no remedy for the enforcement of such direction, and therefore the action taken by the board under the sanction of a solemn oath is presumed to be fair and correct, and is conclusive, subject to the action of the state board of equalization.

It is urged that this is a case in which the boards of equalization had no jurisdiction, and not merely a case of irregular exercise of power. This is not tenable. The petitions admit that the boards of equalization were legally constituted, and that the auditor placed before them for equalization the returns of the district assessors. Having those returns before them for the purpose of equalization, the boards were thereby invested with jurisdiction of the subject matter, and that jurisdiction continued until they completed their work; and if in the course of exercising that jurisdiction they took into consideration matters not required by the statute, that fact might be irregular, but it would not oust the jurisdiction, and would not render the result of their work void.

The petitions concede in the foreparts of them, that the auditor made out and transmitted to the auditor of state, an abstract of the real property of each township returned by the several assessors, with such additions as had been made thereto, and the aggregate value of such real property as returned by the several assessors, inclusive of such additions as had been made thereto. True the pleader charges that it was a *pretended* abstract, and *pretended* additions; but nevertheless an abstract, and additions. And judging by the strong language hurled against those same additions, in other parts of the petitions, the additions

were not mere pretenses, but were substantial both in amount and effect.

The petitions do not charge that the boards did not proceed to equalize the valuations laid before them, but charge that they did not so equalize that each tract or lot of land should be entered on the tax list at its true value, and did not observe the rules prescribed by statute. This concedes that the boards acted upon the returns of the district assessors laid before them by the auditor, and having acted, they undertook to exercise their jurisdiction, and while they may have erred in judgment and proceeding, such error would not render their work void, but only irregular.

The petitions further aver that the decennial boards of equalization proceeded to, and did add to the valuation of the returns made by the district assessors, amounting in the aggregate to \$21,304,460. True they charge that this was illegally and arbitrarily done, but still the fact is conceded that it was done, and that the returns of the district assessors were therefore the basis and foundation to which the additions were made. This and like concessions of fact in the petitions, negative and destroy the averment that the board "wholly ignored and rejected the valuations returned by the district assessors." When a conceded material fact in a pleading is inconsistent with a general allegation in the same pleading, such conceded fact must prevail, and the general allegation be disregarded. Both cannot be true.

It being conceded in the petitions that the decennial boards of equalization made their additions to the returns of the district assessors, it follows that they had jurisdiction of the subject matter; and all the averments in the petition, as to the manner in which they

arrived at the amount of such additions, are insufficient to take away such jurisdiction and render their work void. The statute confers no power on the auditor, to supervise, review, correct, or disregard the work of the boards. He is one of the board, and is bound by the acts of the majority. He, as auditor, has only such powers as are conferred on him by statute, and there is no statute in this state authorizing him to cast aside the additions made to the valuations returned by the district assessors, and certify the amounts of such returns to the auditor of state, without the additions made by the board of equalization. Such an abstract by the county auditor would be in direct violation of the statute; because section 2817 requires him to make out and transmit to the auditor of state, an abstract of the real property, with the aggregate value as returned by the several district assessors, with such additions as shall have been made thereto.

We prefer to dispose of these cases upon the merits of the main question involved, and have therefore not decided the technical questions raised by the defendant, nor the question as to whether mandamus is the proper remedy.

The demurrer to each petition will be sustained, and each petition dismissed.

Judgment accordingly.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS, and
SHAUCK, JJ., concur.

HENDERSON-ACHERT LITHOGRAPHIC COMPANY v. THE
JOHN SHILLITO COMPANY.

Sureties on undertaking in replevin—Remedy against indemnitor—Court of equity cannot compel performance of covenant of indemnity—Before happening of event indemnified.

1. A court of equity cannot compel the performance of a covenant of indemnity, in advance of the happening of the event or contingency upon which, by its terms, it is to be performed.
2. Sureties on an undertaking in replevin have no remedy at law or in equity upon a contract to indemnify them against loss on account of their suretyship, until such loss has occurred; nor has the defendant in the replevin suit who recovered a judgment against the plaintiff therein, though the sureties and judgment debtor be insolvent, and the judgment be otherwise uncollectible.

(Decided March 12, 1901.)

ERROR to the Superior Court of Cincinnati.

The original action was brought by the Henderson-Achert Lithographic Company, against the John Shillito Company, in the Superior Court of Cincinnati, February 27, 1897, on the following petition:

"Plaintiff says that it, and the defendant, are and were at the times named, corporations by the laws of the state of Ohio; that on the 24th day of September, 1889, Belford, Clarke & Company, an Illinois corporation, was indebted to it in the sum of \$2,988.00, and on that day the plaintiff brought suit against said Belford, Clarke & Company, in cause No. 44,303, of this court, and duly levied an attachment on a large stock of books and other merchandise belonging to said Belford, Clarke & Company, which were in the possession of the defendant, and the same were thereupon taken possession of by Leo Schott, the then sheriff of Hamilton county, by virtue of the writ of at-

tachment then issued to him in said cause; that another Illinois corporation, the Book & Stationery Department Supply Company, claimed to be the owner of said attached property, and in order to replevin the same, it requested one George B. Fox to become its surety on a replevin bond and to procure a co-surety for such bond, and to this end the Book & Stationery Department Supply Company, on or about November 1, 1889, authorized the defendant, the John Shillito Company, when the said stock of goods and merchandise which had been attached by the plaintiff as aforesaid should be recovered by replevin, to appropriate the same or so much thereof as would be necessary to protect and indemnify said George B. Fox, and whomsoever he might cause to sign said bond, from any loss by reason of such suretyship; and the said defendant, the John Shillito Company, then agreed and promised the said George B. Fox to hold said stock of books and other merchandise or the proceeds arising from its sale, or so much thereof as would be necessary to indemnify and protect the said Fox and whomsoever he might secure to sign said bond with him, against any loss by reason of his or their said suretyship; and thereupon on the 7th day of November, 1889, the said The Book & Stationery Department Supply Company brought an action in replevin in this court No. 44,378, in which action the said Leo Schott, sheriff, with the defendant, the John Shillito Company, and this plaintiff were made defendants, and the said stock of books and other merchandise were duly seized and taken possession of by the coroner of Hamilton county, to whom the writ of replevin was issued in said action, and were by him taken from the possession of the sheriff who held them by the writ of attachment for the use of the plaintiff as aforesaid; that

subsequently a replevin bond according to law, was duly given in said cause and executed on behalf of the plaintiff in said cause, by the said George B. Fox, and one George Fox who signed said bond at the instance and request of his nephew the said George B. Fox, who, in signing said bond himself and in procuring the said George Fox so to sign the same, relied upon the agreement of the defendant as aforesaid to hold said stock of books and other merchandise, or sufficient of the proceeds thereof to protect and indemnify him and his co-surety; that upon the execution of said bond by said sureties the said coroner delivered said books and other merchandise to the John Shillito Company, the defendant herein, who took possession of the said property for the said Book & Stationery Department Supply Company, the plaintiff in replevin, and in pursuance of its agreement as aforesaid with the said George B. Fox, the said John Shillito Company held said stock of books and other merchandise and has since sold all or the greater part thereof; that in said attachment suit cause No. 44,303 of this court, on July 12, 1890, final judgment was entered sustaining said attachment and rendering judgment in favor of this plaintiff against the said Belford, Clarke & Company for \$3,129.02 and the costs of this plaintiff in said cause, taxed at \$140.35; that in said replevin suit, cause No. 44,378, a judgment was duly rendered on January 22, 1897, in favor of this plaintiff against the said Book & Stationery Department Supply Company, for \$4,365.56, on which judgment there has been paid the sum of \$948.92, being the amount in the hands of the garnishee in said cause No. 44,303, which credit was first applied to the payment of \$140.35, costs in said cause No. 44,303, and the sum of \$808.57 was credited upon the judg-

ment in cause No. 44,378, leaving a balance due the plaintiff herein on the said judgment, of \$3,556.99, with interest thereon from January 4, 1897, and the costs of said suit taxed at \$91.14, which judgment for the balance due thereon is in full force and effect.

"And the plaintiff further says that the defendant, The John Shillito Company, has realized from the sale of said stock of books and other merchandise, more than sufficient to pay the said judgment and interest and costs in cause No. 44,378, but though duly requested refuses to pay, to or for the plaintiff the balance due upon said judgment or to satisfy said judgment; that the said George Fox has died intestate; that his estate and the surviving surety are unable to respond to the obligation arising on said bond, so that the amount due thereon or any part thereof, cannot be collected from the said surviving surety or from the estate of said George B. Fox by legal process.

"Wherefore the plaintiff prays that the defendant may be decreed to pay to the plaintiff the sum of \$3,556.99, with interest thereon from January 4, 1897, and the costs of said cause No. 44,378, taxed at \$91.14, and for all other and proper relief."

An amendment to the petition, filed February 8, 1898, added the following allegation:

"And the said Book & Stationery Department Supply Company is a non-resident of Ohio, and is also wholly insolvent and has no property in this state, and the judgment against it cannot, nor can any part of it hereafter be collected by execution or otherwise at law."

Issue was joined by the following answer:

"The defendant admits that it is a corporation, as alleged; that the plaintiff commenced and prosecuted to final judgment an action against Belford, Clarke

& Company, numbered 44,303 on the dockets of this court, and levied an attachment upon a stock of books and other merchandise, at that time located upon the property of this defendant; that the Book & Stationery Department Supply Company instituted an action in replevin, numbered 44,378 upon the dockets of this court, executing a replevin bond with George Fox and George B. Fox as sureties, and that final judgment has been rendered in favor of this plaintiff and against said The Book & Stationery Department Supply Company in said last named action.

"For want of knowledge the defendant denies that said George Fox has died intestate and that his estate and the surviving surety are unable to respond to the obligations on said bond, and it denies each and every other allegation in the petition not herein expressly admitted to be true.

"Defendant prays to be hence dismissed with its costs."

At the May term, 1898, the cause was tried to a jury, whose verdict was for the plaintiff, for the amount claimed, and judgment followed the verdict. A bill of exceptions duly taken shows that evidence was given by both parties in support of the issues on their respective parts; and, that the court instructed the jury, among other things, in substance, that it was not necessary the sureties on the replevin bond should have sustained any loss, to entitle the plaintiff to the verdict, but that the verdict should be for the plaintiff, for the amount claimed, if the jury should find the defendant, through an authorized agent, entered into the agreement alleged in the petition, and the sureties on the replevin bond relied on that agreement.

The general term reversed the judgment, on the ground that the verdict was contrary to law, and un-

supported by any evidence, and for error in the foregoing charge of the court. Error is prosecuted here to obtain the reversal of the general term.

Other facts deemed important in the disposition of the case will be found in the opinion.

Gustavus H. Wald and Charles B. Wilby, for plaintiff in error.

Upon the execution of the replevin bond with Fox as security thereon, the lithographing company was the creditor, the supply company the debtor, and Fox the surety. Our adversaries contended below that the lithographing company did not become a creditor until after judgment recovered in 1897 on the replevin bond. But the supply company's taking of the goods in replevin was wrongful in the beginning, and the judgment in replevin only judicially established its wrongfulness *ab initio*, and liquidated the damages. The lithographing company was, therefore, the creditor, and the supply company the debtor, and Fox a debtor as surety, from the time of the execution of the bond. *Walsh v. Miller*, 51 Ohio St., 462; *The John Shillito Co. v. Henderson-Achert Lithographing Co.*, 9 Dec., 7; 6 N. P., 25; 9 Dec., 7; 6 Ohio N. P., 28.

(1.) The lithographing company as creditor is subrogated to the rights of Fox to all securities provided for his indemnity by his principal, (2), one of Fox's rights is to sue the Shillito company for its failure safely to keep and hold as a fund for his indemnity the property put into its hands for that purpose by the supply company, the debtor, and which both the supply company and the Shillito company agreed that it should so hold in consideration of Fox signing the bond. (3.) The principal debtor and the surety being insolvent, the creditor may proceed at once to realize

upon the security in the surety's hand, viz.: the right of action against the Shillito company, without first securing a judgment against the principal and surety.

According as this court adopts one or the other of these views either the general term's judgment of reversal should be affirmed, or that judgment should itself be reversed, and the judgment at special term affirmed.

Judge Davis' opinion seems to be based upon two grounds: first, that the security to the surety being for indemnity only is personal to him, and not the subject of subrogation, and second, that the surety not having paid the judgment in replevin, and no judgment having been recovered against him on the replevin bond he has not yet been damnified, and has himself not any right to call on the Shillito company for the fund, and that our right can not rise higher than his. *Stump v. Rogers*, 1 Ohio, 533; *McConnell v. Scott*, 15 Ohio, 401.

True, in the case at bar we have not, formally, recovered judgment against the surety, but we have done what is equivalent thereto (were such judgment a condition precedent to our right of action, as we shall hereafter show it is not, when principal and surety are insolvent), for we have procured judgment against the principal in replevin, a judgment binding on the surety, indisputable by him, and to which he can at any time be made a formal party, without action brought, by summary proceeding. *Richardson v. Bank*, 57 Ohio St., 299; *Coons v. Clifford*, 58 Ohio St., 480; *Ohio Life Ins. & Trust Co. v. Reeder*, 18 Ohio, 35.

That a creditor, upon the insolvency of his debtor and the surety, is entitled by subrogation, or substitution to the benefit of all securities provided by the debtor, not only for the payment of the debt, but for

the mere indemnity of the surety, and that too, without obtaining judgment at law against either, is settled by overwhelming authority. *Pendery v. Allen*, 50 Ohio St., 121; *Kelly v. Herrick*, 131 Mass., 373; *Inst. for Sarings v. Bank*, 9 Allen, 175; *Fickett, In re*, 72 Maine, 266; *Ijams v. Gaither*, 93 N. C., 458; *Morris, Ex parte*, 16 Bankruptcy Reg., 572; *Tompkins Co. v. Catawba Mills*, 82 Fed. Rep., 780; *Keller v. Ashford*, 133 U. S., 610.

A creditor is in equity entitled to the benefit of any collateral securities which the debtor has given to the surety, or person standing in the situation of a surety.

Collateral securities taken by a surety for his indemnity, are regarded as trusts for the better security of the debt, and courts of equity will compel the execution of the trust.

Where a purchaser of land procured a third person to give his note for the consideration money, and to indemnify the maker executed to him his bond and mortgage on the premises, and before the note became due the maker failed, held that the vendor of the land was entitled to the benefit of the bond and mortgage. *Vail v. Foster*, 4 N. Y., 312; *Moses v. Murgatroyd*, 1 Johns. Ch., 129; *Meyers v. Campbell*, 59 N. J. L., 378; *Bank v. Wheeler*, 12 Tex. Civ. App., 489; *Thornton v. Bank*, 71 Mo., 221; *Morrill v. Morrill*, 53 Vt., 74; *Pierce, In re*, 2 Lowell, 343; *Bank v. Stewart*, 4 Dana, 27; *Tolle v. Boeckler*, 12 Mo. App., 54; *Central Trust Co. v. Louisville Trust Co.*, 87 Fed. Rep., 23; *Wolmershausen v. Gulick*, 1893, 2 Ch., 514; *Outlaw v. Reddick*, 11 Ga., 669; *Miller v. Aldrich*, 31 Mich., 408.

The precise point, the liability of the trustee who has wasted the trust fund, to account to the surety, for its value, was decided by this court, in *Gilbert v.*

Sutliff, 3 Ohio St., 129; *State v. Guilford*, 15 Ohio, 593.

The promise safely to hold the books or their proceeds and devote them to Fox's indemnity was a binding promise, and could not be rescinded without his consent. When the defendant without the consent or knowledge of Fox sent the proceeds out of the state and handed them over to a stranger, it broke its promise and Fox instantly had a right of action against it.

It was a promise made not by a stranger, but by a party defendant in the replevin suit. It was a promise to hold as a fund for indemnity of the surety, not Shillito's property, but the property of the *principal debtor*. The only stranger having no interest in the transaction was Fox, the surety, who agreed to assume the liability of a surety on the faith of defendant's promise to keep the books or their proceeds safely as a security for him against loss, and in the freeing of the books from attachment by means of the replevin, defendant had a direct pecuniary interest. That such a promise is not within the statute of frauds, though at first vigorously and confidently denied, seems to have been finally now admitted. Denial would seem useless in the face of *Ferrell v. Maxwell*, 28 Ohio St., 383; *Stoudt v. Hine*, 45 Pa. St., 30; *Jack v. Morrison*, 48 Pa. St., 113; *Justice v. Tollman*, 86 Pa. St., 147.

Browne on the Statute of Frauds, 187. And this is put on the express ground that it is not a promise by a stranger to pay out of his own money, but to pay over funds furnished by the *principal debtor*.

If a mere stranger is liable in advance of payment by the surety to an action for injury to the security, *a fortiori* is one liable who on valuable consideration moving to him from the surety promises to hold for his security property placed in his hands for that pur-

pose, and then in flat violation of his promise without the surety's knowledge or consent hands that property over to a stranger to be carried beyond the borders of the state; and to the surety's right to enforce that liability—"to all his rights"—we are entitled by subrogation. *Wetzell v. Richcreek*, 53 Ohio St., 62; *Schweinfurth v. Railway Co.*, 60 Ohio St., 215; and *Riggin v. Creath*, 60 Ohio St., 114.

Robert Ramsey, Kramer & Kramer, and Maxwell & Ramsey, for defendant in error.

1. Fox waived his right to the securities offered by the supply company.

The letter of November 1, 1889, authorized Dawson to withhold from sale enough merchandise to indemnify Fox, so long as Fox desired that indemnity. It did not authorize him to withhold any of the proceeds of such of the merchandise as should be sold. He had no other source of authority than this letter. But Fox consented at once to the sale of these goods, and they were in fact sold.

While Dawson still held enough of the original stock of goods on hand to indemnify Fox, the latter saw and took a copy of the supply company's letter, disclosing the fact that the security was to consist of merchandise and not money. Yet he continued to acquiesce in the sale of the merchandise.

2. The transaction was between Fox and Dawson individually.

The letter was in terms addressed to Dawson personally. The John Shillito Company had nothing to do with the matter. It was quite outside the scope of Dawson's authority as superintendent of a retail store where these goods were exposed for sale, to agree to withhold part of them from sale. It does not ap-

pear that he communicated with the officers of his company upon the subject. When they remitted the account in September, 1891, they were innocent, both in law and in fact, of any connection with Dawson's undertaking.

3. The securities were for the protection of Fox alone and not for the better securing of the bond. Therefore the lithographing company had no cause of action when they were disposed of in 1891.

The letter expressly stated that the goods were to be held for the protection of Fox against "any loss by being a party to the bond," and held only "until such time as said George B. Fox" should release them. It will be conceded that if Fox had notified the Shillito company that he did not "desire any further guarantee," the remittance of September 5, 1891, would have been proper, and the lithographing company could not have complained. By this test, the indemnity offered is shown to have been strictly personal to Fox and to him alone. *Jones v. Bank*, 29 Conn., 25; *Chambers v. Prewitt*, 71 Ill. App., 119 (Affirmed, 172 Ill., 615); *Logan v. Mitchell*, 67 Mo., 524.

These propositions seem to be sustained by an unbroken line of decisions. *Homer v. Savings Bank*, 7 Conn., 478; *Poole v. Lowe*, 52 Pac. Rep., 741; *Constant v. Matteson*, 22 Ill., 546; *Poole v. Doster*, 59 Miss., 258; *Osborne v. Noble*, 46 Miss., 449; *Howell v. Bank*, 10 Leigh, 206; *Bowman v. McElroy*, 15 La. Ann., 646; *Clay v. Freeman*, 20 So., 871; 2 Brandt, Suretyship, Sec. 326; *Ohio Life Ins. Co. v. Reeder*, 18 Ohio, 35; *Leggett v. McClelland*, 39 Ohio St., 624; *Zuelig v. Hemerlie*, 7 Circ. Dec., 56, 18 C. C. R., 660.

It follows that in 1891, when these goods were disposed of the lithographing company had no cause of action against the Shillito company. It could not pre-

vent the solvent debtor (conceding for the sake of argument that the supply company was then its debtor) from selling any of its property, and therefore could not complain of the Shillito company for delivering the goods.

4. When this equity was asserted, nothing remained but a right to sue, which was purely personal to Fox and not the subject of subrogation.

If the lithographing company has any remedy it can only be availed of by persuading Fox to elect to sue. He should have been made defendant below, and have asserted his rights in this action. After the decision of *Conley v. Chilcote*, 25 Ohio St., 320, the debtor was made defendant and elected to take his exemption out of the attached funds. Subrogation is an equitable mode of avoiding circuitry of action. It is not a doctrine of maintenance, giving the sanction of equity to that which is against the policy of the law. Wald's *Pollock on Contracts*, 299.

If Fox has made no objection to this alleged wrong, equity will not permit anyone else to object. That would be to multiply and not to avoid litigation, whereas the avoiding of litigation is the motive for the doctrine of subrogation.

5. The lithographing company has no greater right than Fox; and he has not been damnified.

A derivative right can not rise above its source. Fox might have had a right of action at law for damages. The defense would have been *non damnificatus*. He was not indemnified against "liability" on the bond, but against "loss." The liability arose, but the loss has not yet occurred, and will not, since both sureties are insolvent.

The distinction between liability and loss in such a case is stated with exactness by the circuit court, in

Pratt v. Walworth, 8 Circ. Dec., 472; 15 C. C. R., 412;
Allison v. McCune, 15 Ohio, 726.

WILLIAMS, J. There appears to have been, at the trial, but one substantial controversy of fact, which was, whether Mr. Dawson, the superintendent of the defendant's store, had authority to, and did, enter into the agreement set forth in the petition, in behalf of the defendant. The jury's determination of that controversy adversely to the defendant, though justified by the evidence, is not necessarily decisive of the case, which, as presented here, is reduced to an inquiry into the nature and effect of the agreement so made. The answer admits that the plaintiff, in an action brought by it against Belford, Clarke & Co., levied an attachment on personal property of that company then in the possession of the defendant here, of sufficient value to satisfy the demand which the plaintiff was there seeking to collect; and that, in the due prosecution of that action the plaintiff recovered judgment for the amount alleged in its petition in this case. It is also admitted that, while the attachment was a subsisting lien on the property it was replevined from the officer at the suit of the Book and Stationery Department Supply Company; and that, the plaintiff here, who was made a defendant in that suit, recovered against the plaintiff therein, a judgment for damages for the wrongful replevin of the property, in an amount equal to the judgment recovered in the attachment case. The evidence shows that, upon the replevin of the property, it was placed by the plaintiff in that suit, in the store of the defendant in this case, for sale on commission by the latter as agent of the former who, in order to obtain sureties on the replevin bond, submitted to Mr. Dawson, then the superintendent of the defendant's store, the following written proposal:

Henderson-Achert Litho. Co. v. The John Shillito Co.

"Jas. W. Dawson, Esq., Cincinnati, O.

"Dear Sir: We hereby authorize you to hold of the stock and mdse. now in the Book & Stat'y Dept. of the John Shillito Company so much in amount as will be necessary to guarantee George B. Fox or whosoever he may have sign bond, against any loss by being a party to the bond given or to be given in a replevin suit of this company vs. The Henderson-Achert Co., and to hold such stock and mdse. until such time as said Geo. B. Fox may notify you in writing that he does not desire any further guarantee.

"Yours truly,

"Book & Stationery Dept. Supply Co.

"C. Higgins, Pres't."

This proposal was accepted, and in pursuance thereof, George B. Fox and another person became sureties on the bond, which was conditioned that the plaintiff in the replevin suit would duly prosecute the same, and pay all costs and damages that should be awarded against it. It was admitted on the trial that the sureties on the replevin bond, and the plaintiff in that suit were, and are, all insolvent; and, that the defendant in this action did not, at the time of its commencement, nor since, have either property or money belonging to the plaintiff in replevin, all having been paid or turned over to the latter, or according to its direction, without the consent of the sureties on the bond.

The defendant's contract of indemnity so entered into, no doubt inured to the benefit of the sureties who, upon the faith of it, incurred their obligation on the replevin bond, as fully as if made directly with them. And it is the contention of counsel for the plaintiff that, when its action was commenced, it was the right of

the sureties to enforce performance of that contract by compelling the defendant to discharge their obligation on the bond, and, as that required the satisfaction of the judgment recovered in the replevin suit, the plaintiff is entitled to the same remedy through the process of subrogation, as here sought.

When not otherwise controlled by express agreement, there is an implied stipulation in the usual unconditional contract of suretyship, that the principal will pay the debt at maturity, and thus protect the surety by relieving him from the burden of his obligation; and, upon failure to do so, the latter had the right in equity, and now has by statute, to compel payment of the debt out of the principal's estate, though the surety made no payment before the commencement of his suit. *Stump v. Rogers*, 1 Ohio, 533. Section 5845, Revised Statutes. The creditor is undoubtedly entitled to subject to the payment of a judgment recovered on the debt, any securities placed by the principal in the hands of the surety for its payment, or for his indemnity against its payment. If the securities consists of tangible property that can be reached by execution, process of that nature is the appropriate remedy for their subjection to the satisfaction of the judgment; for the property, though in the hands of the surety, being the property of the principal debtor, is subject to seizure and sale like other property belonging to him, and its application to the payment of the debt and the consequent discharge of the surety's liability, is in accomplishment of the purpose for which it was placed in his custody. Where the securities are choses in action, counter bonds, or mortgages given by the principal, for the collection of which, and their application to the debt,

an action becomes necessary, the surety may resort to that remedy; and the creditor may oftentimes reach property of that nature in the possession of the surety, without the aid of subrogation, through a creditor's bill, or proceedings in aid of execution. But as the money arising from such securities, however reached, properly belongs to the creditor for the security of whose debt they were intended, equity will aid him through subrogation to the remedies of the surety, which may prove the more effectual, because the creditor in that way becomes entitled to whatever priority of right exists in favor of the surety. This doctrine is sometimes said to rest upon the principle that a trust for the benefit of the creditor attaches to the property *eo instanti* it is placed in the possession of the surety, the execution of which may be enforced at the suit of the creditor, the *cestui que trust*. This was held in *Pendery v. Allen*, 50 Ohio St., 121, and has been in many cases, some of which are cited in the brief of counsel for the plaintiff. In other cases the doctrine is said to arise from that principle of natural equity which requires that his property, in whatever form it may be, who is ultimately liable for the payment of the debt, should be primarily applied to that purpose, in exoneration of the one who is only secondarily liable. Either view presupposes that the securities are placed with the surety, and are the property of the principal debtor. The doctrine has been applied, however, where a stranger to the debt, for a sufficient consideration, has agreed to assume and discharge the obligation of the surety. The creditor may adopt and enforce the promise, for it is the property of his debtor, and its performance includes the payment of the debt. Such being its purpose, a court

of chancery will see that its design is fulfilled. *Champion v. Brown*, 6 Johns. Ch., 406.

A distinction has been made between cases of that kind, and those where the agreement is personal to the surety, for his individual indemnity only, and not for the discharge of his liability; courts in cases of the latter class holding that the creditor acquires no equity to enforce the covenant. *Homer v. Bank*, 7 Conn., 478; *Taylor v. Bank*, 87 Ky., 398; *Bank v. Hastings*, 1 Doug. (Mich.), 225; *Jones v. Bank*, 29 Conn., 25. There are many other authorities to the same point, some of which are cited in the brief for the defendant. An attempt to define the precise scope of this distinction is a task that need not be assumed here further than to remark that it must depend, in each case, upon the terms and conditions of the covenant or contract of indemnity. For, while the right of subrogation is not founded on contract, it is well settled that it may be qualified and controlled by express agreement of the parties; and, in that respect, their rights and obligations may be whatever, by their contract, they choose to make them. Contracts of that nature, like all others, are to be construed and enforced according to the intention of the parties, as derived from the language they have employed.

The contract between the defendant in this action and the plaintiff in the replevin suit, was made by the former's acceptance of the latter's written proposal hereinbefore quoted; and that instrument fixes definitely and conclusively the terms and extent of the defendant's obligation of indemnity to the sureties on the replevin bond. That obligation as there expressed, is "to guarantee" the sureties "against any loss by being a party to

the bond," and to hold the property then in custody of the defendant for that purpose, until such time as the sureties should give notice that they did "not desire any further guarantee." The apparent design of this last clause of the agreement was to provide the defendant with the means of fulfilling its obligation of indemnity. At all events, it does not enlarge nor diminish that obligation, which is to protect the sureties on the replevin bond against loss to them from their suretyship; for, until such loss should occur it is entirely immaterial to them whether the property continue in the possession of the defendant or not, and it is not material then, since the defendant is, in either event, bound to make good the loss. The nature and extent of the defendant's obligation to the sureties, was, therefore, unaffected by the surrender of the property, and of the money arising from the sales made, to the owner. If the property or its proceeds had remained in the possession of the defendant when the plaintiff recovered the judgment in the replevin suit, either could, undoubtedly, have been subjected to its payment by legal process or proceedings. But that would have been, not through, nor by virtue of any rights of the sureties, but by independent remedies belonging to the plaintiff as a creditor.

The plaintiff had no contract with the judgment debtor, nor with the defendant here, that the property placed in the possession of the latter should be held for the payment or security of the debt; nor, did the latter bind itself to any one to hold the property for such purpose. The defendant is a stranger to the debt, and its agreement is one strictly of indemnity to the sureties; so that, its individual liability on the agreement, to enforce which this action was brought,

is in no sense a property right of the plaintiff's debtor, and satisfaction of the judgment obtained therefrom would not be payment out of the debtor's estate, but out of the estate of a stranger. Confessedly, therefore, the liability of the defendant on its covenant to indemnify the sureties against loss, can be reached by the creditor, if at all, only through some right or remedy that belongs to the sureties. And it should be borne in mind that the defendant's obligation does not arise out of any principle of equity, but is created by special agreement of the parties. Except for its express agreement the defendant would have nothing to do with the liability of the sureties. That agreement, therefore, which alone created, must determine the extent of the defendant's liability, both at law and equity; for there is no principle upon which a court of equity, or law, can enlarge the legal effect of the agreement. It seems self-evident that the rights of the creditor through subrogation to the remedies of the sureties can, in no case, exceed those of the latter, and that, until the indemnitor's covenant has been broken, or there has been some failure to perform it, no action can be maintained thereon by either. This was declared in *Ohio Life, etc., Co. v. Reeder*, 18 Ohio, 35, 47, and there is no diversity of authority on that subject.

There is an essential difference, in legal effect, between covenants of indemnity, strictly, that is, of indemnity against loss, and covenants to pay, or assume, or stand for, the debt, or a surety's liability thereon. A right of action accrues on those of the latter class as soon as the debt matures and is unpaid, because the liability then becomes absolute, and the failure to pay is a breach of the express terms of the

covenant. While those of the former class are not broken, and no right of action accrues, until the indemnitee has suffered a loss against which the covenant runs. This distinction grows out of the express terms of the contract, and is well established by authority. It is expressed by Mr. Justice Swayne, in *Wicker v. Hoppock*, 73 U. S. (6 Wall.), 94-99, as follows: "In that class of cases (contracts of indemnity) the obligee cannot recover until he is actually damaged, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well settled distinction between an agreement to indemnify, and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of damages is the full amount agreed to be paid." That the distinction obtains at law, counsel concede. But, it is insisted that a different rule prevails in equity, which, it is claimed, will entertain a suit for the specific performance of indemnifying covenants before a loss has been sustained, by compelling the payment or discharge of the surety's obligation, for his better and more complete exoneration. There is both reason and authority to sustain the proposition that a covenant, though by a stranger, founded upon a sufficient consideration, to pay, or to assume, or to stand for a debt on which a surety is bound, may be specifically enforced in chancery, after the maturity of the debt, if it be not then paid by the covenantor. The reason is, as has already been stated, that by his failure to pay he has failed to perform his covenant, and the remedy is within its express terms. The courts have many times so held. But on no sound principle can a court of chancery, any more than a court of law, compel an indemnitor to perform

his covenant in advance of the happening of the contingency or event upon which, by its terms, it is to be performed. Such a remedy would necessarily involve, not the enforcement of the contract made by the party, but its modification by the court, and its enforcement in that modified form.

It would not be profitable to enter upon an extended examination of the authorities touching this point. They have been reviewed in *Hoy v. Hansborough*, 1 Freem. Ch. (Miss.), 533; *Bank v. Hastings*, 1 Doug. (Mich.), 224-256, *et seq.*, and more recently in the case of *Central Trust Co. v. Louisville Trust Co.*, 100 Fed. Rep., 545, in each of which cases the existence of a remedy like that demanded in this case, on covenants of the same nature, was denied. In the last case above cited, the general character of the contract of indemnity, and of the relief sought, but refused, were practically the same as in the case here under consideration; and, in the opinion of the court it is said of the other two cases, which are there cited, that: "The covenants upon which the indemnitors were sued in each of the cases cited were simple covenants 'to save harmless and indemnify' against loss and damage, and were substantially identical with the covenant upon which this action was brought. In neither had any loss been actually sustained. A mere possible legal liability to pay was in both cases held to be insufficient to satisfy the terms of the bond, and in each case relief was denied upon the ground that the contingency provided by the bond had not arisen. The opinions are well reasoned, and most of the authorities now relied upon by counsel for complainant were considered and distinguished."

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So, in the case before us, the defendant's covenant for the benefit of the securities on the replevin undertaking is one strictly of indemnity against loss on account of their suretyship, and nothing more; and, as they have yet suffered no loss, no right of action has accrued to them thereon, either at law or in equity, and consequently none exists in behalf of the plaintiff.

Judgment affirmed.

BURKET, SHAUCK and DAVIS, JJ., concur.

MINSHALL, C. J., dissents.

DROLESBAUGH v. HILL ET AL.

*Sureties on officer's bond—Liable where under color of office—
He uses unnecessary force and violence.*

The sureties on the bond of an officer, conditioned for the faithful discharge of his duties, are liable thereon to the party injured, where under color of his office in making an arrest with or without warrant, and without probable cause, he uses more force and violence than is necessary.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Crawford county.

Finley & Gallinger and *Anson Wickham*, for plaintiff in error.

We contend that this court and other courts have held under like circumstances that the sureties on the bond are liable. *State v. Blake*, 2 Ohio St., 147.

We think this exact question was settled by this court in the case of *Riley et al. v. Walker*, decided in 1899, found in 42 Bull., 275; 60 Ohio St., 626; among the unreported cases.

In that case a constable armed with a search warrant for the house of one David Walker, entered the premises and there assaulted one Nancy A. Walker. She brought suit upon the official bond of the constable, and the sureties made the same contention in that case that the sureties make in this, viz., that the assault and battery, being no part of the duties of his office, the sureties were not liable—the officer being a trespasser as to Nancy A. Walker. The common pleas court sustained a demurrer to the petition. The circuit court reversed the common pleas, and the Supreme Court on June 6, 1899, affirmed the circuit court.

Whatever distinctions other courts may make between acts done by an officer “by virtue of his office” and acts done “under color of his office” otherwise called *colore officii*, the Supreme Court of this state seems to draw no distinction, as will be observed in the 3d syllabus of the case just quoted, where the term “*colore officii*” is used, and especially in the case of *Ohio v. Jennings*, 4 Ohio St., 418, where this court held that a seizure of goods of A under color of process against B is official misconduct for which the sureties are liable, on the ground that the trespass of the officer “is not the act of a mere individual, but is perpetrated *colore officii*.”

The duties of the city marshal are ministerial, and where he performs his ministerial duties improperly, his sureties are liable. Rev. Stat., 7129, 1847-8-9; *Truesdell v. Combs*, 33 Ohio St., 186; *Reinhard v. City*, 49 Ohio St., 257; *Clancy v. Kenworthy*, 74 Iowa, 740; *Tieman v. Haw*, 49 Iowa, 312; *Commonwealth v. Cole*, 7 B. Mon., 250; *State v. Hays*, 30 W. Va., 107; Central Law Journal, 477.

Harris & Sears, for defendants in error.

It is an elementary principle of law, so well established as to scarcely require the citation of authorities to support it, that the liability of sureties is *strictissimi juris*, and cannot be extended by implication beyond the scope of their engagements, or the reasonably necessary import of the language of their bond. This rule, is, in its general terms at least, so well settled that it may be regarded as axiomatic. Murfree on Official Bonds, Sec. 710; *McGovney v. State*, 20 Ohio, 93.

It follows, then, that the sureties can rely on the strict wording of their bond, and plaintiff, to hold them liable, must make allegations clearly showing a breach of the condition of such bond, otherwise, his petition, as against the sureties, is demurrable.

The sureties simply undertook, when they signed Hill's bond, that Hill should faithfully perform his duties as marshal of the city of Bucyrus. They did not undertake to be responsible for any violation of the law of the state of Ohio, which Mr. Hill as an individual might commit, *unless* such act or violation of law, on the part of Hill, amounted to an unfaithful performance of his official duty. It then becomes pertinent for us to consider what are the official duties of the marshal of Bucyrus. We find them defined in the laws of Ohio, sections 1847-1854, inclusive.

Section 7129 of the Revised Statutes authorizes a marshal to arrest anyone found violating the law of the state or ordinance of the city or village, until a legal warrant can be obtained; this is what we commonly understand to be arresting on view.

If the marshal committed the grievances complained of in the amended petition, he is liable for his trespass, in tort, the same as any other individual.

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The sureties on his bond did not undertake to make themselves liable for an assault and battery which Hill might commit while he was marshal, any more than they would be liable if he should rob a hen-roost, or run away with another man's wife; and an averment in a petition, charging that he stole sheep, by virtue of his office, would be no more meaningless, than the allegation in the petition that he committed an assault by virtue of his office; for the simple reason, that the duties imposed upon him by law, and which his bond guarantees that he will faithfully perform, include none of the offenses or trespasses mentioned.

The averments of the amended petition, place Hill upon the same level and footing of any individual trespasser, and the facts alleged, are sufficient to have warranted Drolesbaugh in resisting arrest and defending himself, if necessary, to the extent of disabling or killing his assailant. Murfree on Official Bonds, Secs. 459 and 781; 33 N. C., 151, cited in 21 L. R. A., 738; 72 N. C., 110; 37 Ill. App., 490; *Jewell v. Mills*, 3 Bush, 67.

The court will note that plaintiff in his amended petition avers that the acts complained of, committed by Hill, with the exception of the alleged assault in the city prison, were done by Hill the marshal by virtue of his office of marshal; and counsel for plaintiff in error, in their brief, not only seek to exclude the idea that the trespass complained of was committed by the marshal, merely *under color* of his office, and not by virtue of his office; but they even attempt to argue that the Supreme Court of Ohio in the case of *Ohio v. Jennings*, 4 Ohio St., 418, and also in the case of *Riley v. Walker*, decided by this court without report, but reported by somebody in volume 42

W. L. B., 275; 60 Ohio St., 626, either abrogate or disregard the established rule, that for acts done by an officer *colore officii*, his sureties are not liable. That the rule is what we have stated the following authorities will show: Brandt on Suretyship, Sec. 566; 37 Wis., 43; 8 Neb., 344; 3 Bush. Ky., 62; Throop on Public Officials, Sec. 238; 10 Mass., 309; 13 Mo., 437; 8 Tenn.; 21 Wis. 684; 9 Mo., 63.

We think the present case especially on the facts is distinguishable from the case of *Ohio v. Jennings*, 4 Ohio St., 418, 423, cited by counsel for plaintiff in error. We do not think that Judge Thurman in deciding that case used the term *colore officii* in its technical or legal significance, as contra distinguished from *virtute officii*; the particular fact being considered and discussed by the court, was, that an official *under color* of a process against B has seized the goods of A, and it was merely owing to the fact that the trespass had been so committed *under color* of a legal process, which the offender actually had and held, that the court denominated his act *colore officii*. In reality, when considered in the light of the well defined meaning of the terms *colore officii* and *virtute officii*, it is quite apparent that the act of the constable in *Jennings v. State* was legally and technically *virtute officii*.

The principle controlling in *Ohio v. Jennings*, *supra*, is well illustrated in the case of *People v. Scuyler*, 4 N. Y. P., 173; *Seeley v. Birdsall*, 15 Johns., 267; *Allcock v. Andrews*, 3 Esp., 540n.

See also the distinction defined in Wilfield's *Adjudged Words and Phrases*, page 632; Murfree on *Official Bonds*, Sec. 698 and 699; Brandt on *Suretyship*, Sec. 566.

MINSHALL, C. J. The action below was a suit against Hill, the city marshal of Bucyrus, and his sureties on his bond. To the petition as amended the court sustained a demurrer, and rendered judgment for the defendants. The judgment was affirmed on error, by the circuit court, and the ruling is brought here for review.

The petition alleges the election of Hill as marshal of the city of Bucyrus, and his qualification by giving bond in the sum of \$1,000, as required by law, with Charles Clark, J. B. Morgan, and W. M. Reid his sureties thereon; conditioned that "if the said Charles E. Hill as such marshal of said city shall faithfully perform the duties of his said office, then this obligation shall be void, and otherwise to remain in full force and virtue;" and then assigns as a breach of the bond:

"That the said Charles E. Hill, as marshal of said city of Bucyrus, on the 27th day of March, 1897, in his official capacity of marshal aforesaid, and by virtue of his said office of marshal, did unlawfully and without reasonable or probable cause, and without warrant or any process of any court, arrest this plaintiff upon the streets of said city in the presence of divers and sundry good people, and then and there by virtue of his said office of marshal, did forcibly and unlawfully drag the plaintiff along and over the streets of said city to the jail or lockup of said city, in the presence of divers and sundry good people, and did then and there in his official capacity of marshal, and by virtue of his said office, unlawfully, without warrant or any process of any court, incarcerate the plaintiff in said jail or lockup of said city, and then and there by virtue of his said office of marshal aforesaid, did unlawfully imprison the plaintiff in said

lockup or jail for the period of about two hours; and plaintiff says that said Charles E. Hill, while unlawfully having this plaintiff in his custody as aforesaid, did then and there in the presence of divers persons, unlawfully pinch plaintiff's arm thereby bruising and wounding the same and causing plaintiff great pain, and did beat, wound and bruise plaintiff by striking him with his fist in plaintiff's face, cutting and lacerating plaintiff's lips and knocking one of his teeth loose, and did then and there unlawfully demand and receive of plaintiff the sum of five dollars for releasing plaintiff from said unlawful imprisonment," and asks judgment for \$1,000.

The question then presented is, whether the averments of the petition show a breach of the condition of the bond.

The contention of the defendant in error is, that it simply shows the commission of an assault and battery on the plaintiff, for which the defendant is liable in his capacity as an individual, and not in his capacity as an officer; or that the averments show that he simply acted under the color of his office and not in virtue of it. Some such distinction has been taken in some of the cases, but it is not generally followed, as it is of little practicable application. In *Story v. Jennings*, 4 Ohio St., 418, where a constable under a writ of replevin against B took the property of A it was held that the sureties on his official bond were liable. Thurman, J., delivering the opinion, says: "The authorities seem quite conclusive, that a seizure of the goods of A under color of process against B is *official misconduct* in the officer making the seizure; and is a breach of the condition of his official bond, where that is, that he will faithfully perform the duties of his office. The reason for this is, that the

trespass is not the act of a mere individual, but is perpetrated *colore officii*." He cites many cases in support of the holding, and among others, that of *The People v. Schuyler*, 4 Com., 173. That such is the generally received doctrine, see *Brandt on Suretyship*, Sec. 566; *Throop, Public Officers*, Secs. 240, 241; *Lowell v. Parker*, 10 Met., 309, 313; *Lammon v. Feusier*, 111 U. S., 17, 22; *Murfree, Official Bonds*, Sec. 303.

It is not difficult to distinguish between an act done by an officer in his capacity as an individual, and one done in his capacity as an officer; for the former his sureties are not liable in any case, for the latter they generally are when the act is wrongful and results in injury to another. Constables and marshals are clothed with very considerable power over the citizen. They may without a warrant make an arrest on view for an offense committed in their presence, as well as on a warrant. The peace and good order of society requires that they should have such powers; but the protection of the individual requires that the same should be exercised in a reasonable and prudent manner; and to secure this, a bond with sureties is exacted for the faithful discharge of their duties. An officer in making an arrest has the right to use such force as may be necessary to overcome any resistance to the execution of his office, offered by the person to be arrested; but he must use no more force or violence than is reasonably necessary for the purpose; and if he does he makes himself and his sureties liable upon his bond to the party injured. The averments of the petition are quite specific. It is averred that by virtue of his office, the marshal unlawfully arrested the plaintiff, struck, bruised and ill-treated him, dragged him through the streets, confined him in the jail and ex-

acted five dollars for his release. It is true that it is averred that this was done without any warrant or probable cause. It does not follow from this that it was not done in his capacity as marshal. If he had no warrant, he had the right to arrest upon view of what he deemed an offense. The fact that it is averred that he acted by virtue of his office precludes the idea that he acted as an individual and of his own wrong. From the petition it appears that what he did, he did as an officer and not as an individual, and the averments of the petition are consistent with such having been the fact. He may have made the arrest upon view, and have used no more force than was necessary. If such is the case, he and his sureties may defend themselves by setting up the facts in an answer. The petition therefore makes a case.

In the case of *Clancy v. Kenworthy*, 74 Iowa, 740, the facts were much the same as in this case, and the same argument was made against the sufficiency of the petition. In answer to the argument the court said:

"If in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in the discharge of his duty he of course is not liable. It follows that if defendant's position be sound, no action can be maintained on the bond in any case."

It would seem that the public have as much interest, if not more, in the duty of an officer not to colorably exercise the powers with which he is clothed, as not to use unnecessary violence, where he is other-

wise clearly within the duties of his office. It is by virtue of the office he holds that he may exercise its duties to the injury of another. It is not probable that any individual, not an officer, would have attempted to do what the marshal is charged with doing.

Our attention is called to the case of *Carpenter v. Sloane*, 20 Ohio, 327, as practically determining this one. A clerk and his sureties were sued on his official bond, for having issued letters to a guardian without having taken a bond. The court held that he was not liable on his bond for the reason that it was not his official duty to see that a bond had been given. Manifestly the case has no application here.

However the law may be in some of the other states, in this, and many of the others, where an officer acting under color of his official duties, commits a wrong to the injury of another, he, with his sureties, is liable on his bond to the party injured. The wrongful making of an arrest by an officer *colore officii* is an unfaithful discharge of his duties, and therefore a breach of his bond.

Judgment reversed and cause remanded for further proceedings.

SHAUCK, DAVIS, SPEAR, BURKET and WILLIAMS, JJ.,
concur.

BRADY v. THE NATIONAL SUPPLY COMPANY.**SAME v. THE UNION SUPPLY & HARDWARE COMPANY.**

Corporation need not aver it is a corporation—When commencing an action—Burden of proof—When corporation is defendant and its powers questioned—Must be specially pleaded—Rule as to foreign corporations.

1. Where a corporation commences an action, it need not aver in its petition that it is a corporation; and if such averment is made, it will be held to be immaterial and mere surplusage, and a general denial to a petition containing such averment will not impose upon the plaintiff the burden of proving on the trial that it is such corporation.
2. To raise the issue of *nul tiel corporation*, the defendant must specially plead in his answer that the plaintiff is not a corporation. *Smith v. Weed Sewing Machine Co.*, 26 Ohio St., 562, approved and followed.
3. Where a corporation is made a defendant, and its charter, powers or franchises become the foundation of the action, the same must be specially pleaded in the petition; and in the case of a foreign corporation, the name of the state by which, and the substantial terms in which, the charter, powers or franchises were granted, should appear in the petition. *Devoss v. Gray*, 22 Ohio St., 159, approved and followed.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Lucas county.

These two cases were heard and considered together. In the National Supply Company case, the petition avers that the company is a corporation duly incorporated under the laws of the state of West Virginia, that it is doing business in the state of Ohio, and that it has complied with the laws of this state relating to foreign corporations doing business in Ohio, and then proceeds to state its cause of action arising on a judgment recovered by it against said

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Frank E. Brady in the state of Indiana. The answer is a general denial.

In the Union Supply and Hardware Company case, the petition avers that it is a corporation duly organized and incorporated under the laws of the state of Ohio, and is doing business in this state, and then declares upon a judgment recovered by it against said Frank E. Brady in the state of Indiana. The answer is a general denial.

No proof of the incorporation of either company was introduced upon the trial in the court of common pleas, other than the transcripts of the judgments so recovered in the state of Indiana. Plaintiff in error claims that in the absence of such proof the judgment should have been in his favor. The court of common pleas regarded such proof unnecessary and rendered judgment against him in both cases. The circuit court affirmed the judgments, and thereupon Mr. Brady filed his petition in error in this court, seeking to reverse the judgments of the courts below.

C. F. Watts, for plaintiff in error, cited the following authorities: *Lewis v. Bank*, 12 Ohio, 132; *Smith v. Sewing Machine Co.*, 26 Ohio St., 562; Bliss Code Pleading, Secs. 247, 248; Kinkead Code Pleading, Vol. 2, Sec. 990; *Goodrich v. Jacobs*, 6 Ohio, 43; Am. & Eng. Ency. of Law, 1st ed., Vol. 12, page 149; *Whittaker v. Branson*, 12 Paine, C. C., 209; 2 Freeman on Judgments, 4th ed., Sec. 456; 2 Chitty on Pleadings, 482; *Adait v. Rogers*, Wright, 428; *Laurence v. Willoughby*, 1 Minn., 87; *Newburg v. Munshower*, 29 Ohio St., 617; *Toledo Com. Co. v. Glen Mfg. Co.*, 55 Ohio St., 217.

Ira C. Taber, for defendants in error, cited the following authorities: *Methodist Church v. Wood*, 5

Ohio, 283; *Elektron Mfg. Co. v. Electric Co.*, 4 Circ. Dec., 555; 8 C. C. R., 311; *Smith v. Sewing Machine Co.*, 26 Ohio St., 562; *Lewis v. Bank*, 12 Ohio, 132; Section 148c, Revised Statutes; *Brown v. State*, 11 Ohio, 276; *Watson v. Brown*, 14 Ohio, 473; *Anderson v. Kerns Draining Co.*, 14 Ind., 199; *Lewis v. American Savings & Loan Assn.*, 98 Wis., 203.

BY THE COURT:

"At common law a corporation, when it sues, need not set forth its title in the declaration; but if issue be taken, it must show, by evidence upon the trial, that it is a body corporate, having legal authority to make the contract which it seeks to enforce, if the action be upon contract, or to sue in that character and capacity in which it appears in court. * * * The code does not require the title of the plaintiff to sue to be more specifically set out than was required at common law." *Smith v. Weed Sewing Machine Company*, 26 Ohio St., 565.

It is therefore not necessary to aver in a petition that the plaintiff is a corporation, and if such averment is made in the petition it will not be held to be a material allegation, and will be regarded as mere surplusage, and a general denial to a petition containing such an averment will not impose upon the plaintiff the burden of proving at the trial that the plaintiff is a corporation. If the defendant desires to raise the issue as to whether the plaintiff is a corporation, he must specially plead and aver in his answer that the plaintiff is not a corporation, and has no right to contract or sue as such, as the case may be.

The same rule applies when a corporation comes in by way of cross-petition.

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If, however, a corporation is made a defendant in an action, and its charter, powers or franchises become the foundation of such action, the same must be specifically pleaded in the petition; and if the corporation be a foreign one, the name of the state by which, and the substantial terms in which, the charter, powers and franchises were granted, should appear in the petition. *Devoss v. Gray*, 22 Ohio St., 159.

Judgments affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS
and SHAUCK, JJ., concur.

THE STATE OF OHIO v. JOHNSON.

Burglary—Section 6835, Rev. Stat.—Sufficiency of indictment.

Under Revised Statutes, section 6835, as amended (82 O. L., 161), an indictment charging the defendant with having burglariously broken and entered "a certain building, to-wit, a certain store room then and there situate the property of one J. M. Durkin," is sufficient.

(Decided March 12, 1901.)

EXCEPTIONS by the Prosecuting Attorney to the rulings of the Court of Common Pleas of Greene county.

The defendant was indicted for burglary and larceny. The indictment charged the defendant with breaking into "a certain building, to-wit, a certain store room then and there situate, the property of one J. M. Durkin." The defendant was arraigned, pleaded not guilty, trial was had, and he was convicted as charged in the indictment. On the day of conviction a motion to arrest judgment was filed by the defendant's counsel and was sustained by the court on the

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sole ground that it is no crime in Ohio to enter or attempt to enter a store room, notwithstanding the proof shows it to be a building. To this decision of the court of common pleas the prosecuting attorney, on leave granted him, has filed his bill of exceptions.

Marcus Shoup, Prosecuting Attorney, for the state.

W. F. Truder, for the defendant.

BY THE COURT:

General words, following particular words must, as a general rule, be confined to things of the same kind as those specified. *Shultz v. Cambridge*, 38 Ohio St., 659. But this is a rule which is designed to be used in aid of the interpretation of a statute, and ought not to be so used as to limit or defeat the legislative intent. The things specified in section 6835 of the Revised Statutes are not in any respect "things of the same kind," except that they are all buildings: so that the effect of the amendment to the section (82 O. L., 161), by adding the words "or any other building," is to extend the crime of burglary to any building whatever. This indictment with appropriate averments as to time, place and intent, charges that the burglary was committed by breaking and entering "a certain building, to-wit, a certain store room then and there situate, the property of one J. M. Durkin." This designates the building with sufficient certainty, whether the store room is the whole or only a part of the building; for breaking into such a room is necessarily breaking into the building of which it is a part. The case of *Hagar v. The State*, 35 Ohio St., 268, does not apply since the amendment of the statute.

Exceptions sustained.

MINSHALL, C J., WILLIAMS, BURKET, SPEAR, DAVIS
and SHAUCK, JJ., concur.

STATE OF OHIO v. THE DAYTON TRACTION COMPANY
AND THE CINCINNATI AND MIAMI VALLEY
TRACTION COMPANY.

Electric railway company in city and interurban electric railway company—May enter into valid arrangement to carry merchandise—Section 3443-11, Rev. Stat.

An electric railway company owning and operating a road upon a street of a city and an interurban electric railway company may, by favor of the provisions of section 3443-11 of the Revised Statutes, enter into a valid traffic arrangement for the carriage of merchandise for hire upon said street.

(Decided March 26, 1901.)

ERROR to the Circuit Court of Montgomery county.

On the 31st day of January, 1899, the former attorney general filed a petition in the circuit court of Montgomery county in the name of the state against said defendants, alleging that they are corporations of Dayton owned by the defendant, The Dayton Traction Company having its principal place of business in the city of Dayton, and the Cincinnati and Miami Valley Traction Company having property and doing business in the county of Montgomery in said state; that on or about the 9th day of April, 1898, said defendants entered into an agreement for the conduct and management of the street railroad line in the city of Dayton owned by the defendant, the Dayton Traction Company, since which date said street railroad has been managed and operated pursuant to said agreement; and defendants charge that in the operation and management of said road pursuant to said operating agreement the said companies are offending against the laws of the state and exercising a franchise not conferred in the following respect:

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"Defendants in the operation and management of said street railway in said city, over and upon Main street, in about the month of September, 1897, commenced, and are so continuing to do, by cars specially designed for that purpose and otherwise, to transport and carry over and upon said street railway, merchandise and freight for hire, all of which was and is contrary to the laws of Ohio and the ordinances of said city of Dayton."

The petition prays that the defendants be ousted from the franchise so alleged to be unlawfully assumed. To the petition the companies filed separate answers. Demurrers to these answers were interposed by the state, but on a hearing the circuit court being of the opinion that the petition does not state a cause of action, overruled the demurrers as to the answers and sustained them as against the petition. To reverse that judgment this proceeding in error is prosecuted.

John M. Sheets, attorney general, and *H. R. Probasco*, for plaintiff in error.

There is but one question involved in this case: Has a street railway company, formed for the purpose of building and maintaining a "street railroad," the power to transport freight by freight cars, or otherwise, over the streets of a municipality in Ohio, or if, as an abstract proposition, it has the power, then has it the power to do so in the face of the provisions of a municipal ordinance expressly prohibiting the transportation of freight, and limiting it to the transportation of passengers only?

The avowed purpose of the Dayton Traction Company is, as has been stated, the construction and operation of a "street railway." The term "street rail-

way" or "street railroad" is technical. It does not mean simply a railroad track laid upon a street over and upon which cars for the transportation of passengers and merchandise may be used, but it means a railroad track so constructed upon the street as to not unnecessarily interfere with the public in the use of that portion of the street upon which the track is placed, over and upon which cars may be propelled for the transportation of passengers and their parcels in hand, the motive power of which cars may be such motive power as is approved by the authorities in control of the streets, and which is not inconsistent with the safety and comfort of the general public and the owners of abutting property. Subject to these limitations and restrictions railroads have been permitted to be constructed and operated upon the streets as a means of public convenience, but "a distinctive and essential feature of a street railway, in relation to other railroads, is that it is exclusively for the transportation of passengers, and not of goods." Booth on Street Railways, Sec. 1, and note; *Williams v. City Elec. St. Ry. Co.*, 41 Fed. Rep., 556; Elliott on Roads and Streets, pp. 557 to 558; *Louisville Trust Co. v. Cincinnati*, 76 Fed. Rep., 312; Joyce on Electric Law, Sec. 6; See Secs. 2640, 2501, 2502, 2505, 2505a, 2505c, Revised Statutes.

Paragraph 1 of section 3443-1 (Cincinnati Street Railway), uses the language, "agrees to carry *passengers* (not freight) thereon at the lowest rates of *fare*;" and, "bidder proposing to carry *passengers* (not freight) on such route at a low rate of *fare*;" and paragraph 2 of the same section prohibits an increase in the charge for carrying *passengers* (not freight), on any street railroad so extended."

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The word "fare" means the sum paid, or due, for conveying a *person* by land or water, * * * as the *fare* for conveying in a coach, or by railway." Webster's Dictionary; 8 Am. & Eng. Enc. Law, 902, and n. 1; 7 Ib. 810; *Massillon Bridge Co. v. Iron Co.*, 59 Ohio St., 179.

The city of Dayton, by and through its officers and council, had the control of and the regulation of the use of the public highways (Sec. 2640, Revised Statutes; *State v. Cincinnati Gas Co.*, 18 Ohio St., 262, and it will not be denied that its council had the right to pass the general street railroad ordinance of June 11, 1869 (Sec. 2501, Revised Statutes), entitled: "An ordinance to prescribe the terms and conditions of the use of the streets and avenues of this city by street passenger railroads," in Sec. 3 of which is to be found the following language: "And no road (street railroad) shall be used for transportation of freight, but only for passengers and their ordinary baggage, or packages in hand."

The municipal corporation of Dayton, therefore, having the exclusive power to impose the terms and conditions upon which the Dayton Traction Company might use the streets of that city for the conduct of a street railway business, the exercise of such powers, whether inherent or delegated, were not subject to judicial control. Booth on Street Railroads, Sec. 16; Cooley's Constitutional Limitations (6th ed.), pp. 252-253; *Milhau v. Sharp*, 17 Barb., 435.

The grant made to the Dayton Traction Company must be strictly construed against it, and liberally in favor of the plaintiff (the public), and the grant, or license, can not be extended beyond its express terms. *Railroad Co. v. Defiance*, 52 Ohio St., 262; *Ravenna*

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v. Penn. Company, 45 Ohio St., 118; *Transportation Co. v. Palace Car Company*, 139 U. S., 24.

The avowed purpose of the Dayton Traction Company in its articles of incorporation was the conduct of a "street railway business," and it has not the power to do any other business than a street railroad business. *Railway v. Iron Co.*, 46 Ohio St., 44.

The abutting property holders, whose consents must necessarily have been obtained, were filed with the council of the city of Dayton to give it jurisdiction to grant a franchise to the Dayton Traction Company, consented to the construction and operation of a street railway. It, the Dayton Traction Company, could not afterwards use the track for transportation of freight without obtaining additional consents of abutting property owners, and a new franchise. *Booth on Street Railways*, Sec. 6; *Attorney General v. Railway Co.*, 112 Ill., 611.

Quo warranto was the proper remedy in this case; the attorney general was the proper officer, and the Montgomery county circuit court had jurisdiction. Sec. 204, Revised Statutes; Sec. 5026, Revised Statutes; *State v. Anderson*, 45 Ohio St., 196; Secs. 6761-2-3, and 6768.

The motive of the attorney general will not be inquired into where it is alleged that a corporation is guilty of usurpation of franchises or powers. *State v. Gleason*, 12 Florida, 190; *Commonwealth v. Bank*, 10 Phil. (Pa.), 156; 19 Am. & Eng. Enc. Law, pp. 675, 676.

The defendants were required to disclose by their answer their rights and titles to the franchise in controversy, and should have shown by their answers a good title as against the state, and failing to do so, judgment should have been against them. High on

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Ex. Remedies, Secs. 629 and 712; *State v. Beecher*, 15 Ohio, 723; *State v. Vanderbilt*, 37 Ohio St., 590, 631; Cooley's Constitutional Limitations, 395; *Bissell v. Railway Co.*, 22 N. Y., 259; *Bradley v. Railway Co.*, 21 Conn., 306.

McMahon & McMahon, for defendant in error.

The circuit court held that an ordinary street railroad had the right to carry merchandise, prior to the law of May 17, 1894.

In addition to the able argument contained in the decision in this case reported in *State v. Traction Co.*, 10 Circ. Dec., 212; 18 C. C. R., 490, to which we refer, we beg leave to suggest the following points, assuming for the argument, that the Dayton Traction Company had the powers of an ordinary street railroad only:

Street railroads existed prior to the act of 1861, and were recognized as valid corporations existing under the statutes then in force. See the act of the legislature of March 5, 1860, 57 O. L., 16, Secs. 14, 15, 16 and 17, to be found in 2 Swan & Critchfield, Revised Statutes (1860), pp. 1557-1560; *Street Railway Co. v. Cumminsville*, 14 Ohio St., 523.

No distinction was recognized in law as to freight or passengers. Both were railroads. The nature of things made them exclusively passenger roads. The general act of 1861, which purported to be a special provision for street railroads, 58 O. L., 66, provided in section 1 how street railroad companies should be organized, and in section 2 defined their powers. By section 3 of the act, sections 5, 6, 7, 8, 9, and 14 of the general act of incorporation were made a part of the act. Section 4 provided for consolidation; section 5 provided the manner of consent of city and referred expressly to the act of March 5, 1860, above cited, etc.

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By the general revision of the statutes, in 1880, the act of April 10, 1861, was repealed in express terms. Revised Statutes, 1880; Vol. 2, p. 1763, Repeal 467.

No provision will be found in the statutes of 1880 for the organization of street railroads, or defining their powers. All the express provisions are found in Secs. 2501 to 2505 inclusive, and Secs. 3437 to 3443, inclusive.

Organization, powers, right to borrow money, consolidate, etc., all rested in the general act, either under chapter 1, or chapter 2, and street railroads were again practically railroads, subject to the laws regulating steam railroads in so far as they were applicable.

By act of March 13, 1883, it was ordained that nothing in the Revised Statutes relating to railroads, prior to Sec. 3437 shall apply to street railroads, except Secs. 3287, 3288, and 3289—these sections providing for borrowing money, executing mortgages, etc.

There has not existed since 1880 any statute defining or limiting the *powers* of a railroad company organized as a street railroad company. It will be observed that in the railroad chapter defining the powers, etc., of what are known as steam railroads, there is no express grant of the right to carry persons and freight. That right is assumed to exist, and its exercise is regulated by various provisions of law.

The attorney general, or his representative, argues upon an alleged prohibition in an ancient ordinance of 1869, which nowhere appears in the record. We do not care for this antiquity although the circuit court seems to have considered the case as though such an ordinance was in the record. In the view the court took of such an ordinance its existence was imma-

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terial. But this court cannot take cognizance of an unpleaded ordinance, in an argument upon demurrer. Dillon on Municipal Corporations, Sec. 83, Sec. 412; Am. and Eng. Enc. Law, Title, Judicial Notice.

But proceeding now further upon the assumption that under the statute a street railroad company can carry freight unless restrained by ordinance, let us consider whether an action in *quo warranto* will lie if the railroad company carries freight merely in violation either of the ordinance granting it the right in the streets, or a general ordinance regulating street railroads.

Section 6761 provides for the cases when this action may be brought against a corporation.

If the statutes of the state give it the right to carry freight, and the right to exercise such franchise has been granted away in a contract or otherwise to the city, assuming that the city can impose or require such conditions, it appears to us that the public interest has been to a great extent eliminated, and that the question becomes one between the city and the railroad company, and that a plain and exclusive remedy exists in favor of the city under the Revised Statutes of Ohio; and that the cause of action is not a claim by contract or otherwise to a franchise in contravention of law. Sec. 1777, Ohio Statutes; *State v. Berry*, 14 Ohio St., 315; *State v. Ganson*, 58 Ohio St., 313; *State v. Marlow*, 15 Ohio St., 114.

That section 1777 covers the contract between the city and a street railroad is decided in *Street R. R. Co. v. Smith*, 29 Ohio St., 291.

And as any taxpayer can set the city solicitor in motion, and upon his failure to act, can himself proceed, at the expense of the city, the remedy is very complete.

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We refer to the following cases outside of Ohio where the law has been similarly declared—particularly where private interests are behind the state name, And we refer more especially to the case in 172 Illinois, cited below, and the cases referred to in it. *Attorney General v. Gas Co.*, DeGex McN. & Gordon, 303; *People v. Equity Gas Co.*, 141 N. Y., 232; *Attorney General v. Railroad Company*, 125 Mass., 515; *People v. Gen. Elec. R. Co.*, 172 Illinois, 129; *New Hampshire v. Louisiana*, 108 U. S., 76.

SHAUCK, J. The petition does not call upon the defendants to show by what authority they assume to exercise the franchise or privilege in question; but, conceding that they are common carriers authorized to carry passengers on Main street in Dayton, it charges the carriage of freight and merchandise on said street for hire as the usurpation of a franchise not conferred. In any view *quo warranto* is a prerogative writ to be employed to shield the sovereignty of the state from invasion and to prevent the abuse of corporate powers. We have become familiar with its use to prevent combinations among artificial persons to stifle competition. It is quite obvious that it should not be resorted to at the instance of a competitor, for the purpose of preventing competition.

We have therefore to inquire whether the carriage of merchandise for hire under the conditions presented is the exercise of a franchise not conferred upon carrying companies of this character. Because the petition avers that the defendant companies have entered into an agreement for the conduct of the road on Main street, and impliedly avers, or at least permits the inference, that one of them is an electric interurban road, having its termini at Cincinnati and

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Dayton, and the other an electric company owning the road upon Main street in Dayton, it will justify the judgment of the circuit court if the right in question might result from any operating agreement or arrangement into which the said companies are authorized to enter.

Counsel for the plaintiff in error urge as conclusive of the subject numerous texts and decisions in which street railroads are defined as carriers of passengers. Usually they have been so defined for the obvious reason that until recently they were exclusively engaged in the carriage of passengers; but the general definition cannot be material in view of recent legislation in which the term is applied to roads constructed upon highways, interurban as well as urban, the only requirement being that in construction and operation they shall be consistent with the former and ordinary use of such highways, and in which legislation provision is made for the carriage of merchandise. It is well known that it was in response to a general demand for increased traffic facilities between cities and the regions surrounding them that the act of May 17, 1894 (91 O. L., 285), which is now included in sections 3443-8 to 3443-13 of the Revised Statutes, was enacted. In that act railways of this character, wherever located, are called street railways. The second section authorized them upon obtaining the consent of the authorities controlling them, and of the owners of the property abutting on them, to occupy and use highways outside of cities and villages. The fourth section of the act (3443-11, R. S.) is as follows:

"Section 4. Such companies shall have power to lease, purchase or make traffic arrangements with any other street railroad company as to so much of

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its tracks and other property as may be necessary or desirable to enable them to enter or pass through any city or village, upon the same terms and conditions applicable to other street railroads. And any existing street railroad company owning or operating a street railroad shall receive the cars, freight, packages or passengers of any other road, upon the same terms and conditions as they carry for the general public."

Since the provisions of this section contain definite authority for the making of a traffic arrangement by which the defendants might have and exercise the powers which the petition alleges they are now exercising, the view taken of the petition in the circuit court is correct.

Judgment affirmed.

BURKET, SPEAR and DAVIS, JJ., concur.

THE STATE OF OHIO EX REL. ATTORNEY GENERAL v.
THE INTERSTATE SAVINGS INVESTMENT COMPANY.

*Contracts of investment security, debentures or certificates—
Called and redeemed by method of unequal advantage to
holders are unlawful, when—Accumulation of reserve fund
by lapses also unlawful, when.*

1. Contracts of investment security, debentures or certificates, which by the device of a "numeral-apart," may be called in and redeemed at any period before they would regularly accumulate a credit in the reserve fund equal to the stipulated endowment value, and otherwise giving unequal advantages to the certificate holders, contain the elements of chance and prize constituting a lottery, and are unlawful.
2. Contracts of investment security, debentures or certificates, which cannot reasonably be expected to accumulate a reserve fund equal to the stipulated endowment values within the stated period, without aid from lapses or appropriation from premiums on new business, are fraudulent, contrary to public policy and unlawful.

(Decided March 26, 1901.)

IN QUO WARRANTO.

By petition in *quo warranto* the attorney general alleges that the defendant, The Interstate Savings Investment Company, has continuously since its incorporation within this state misused its corporate authority, franchises and privileges, and assumed franchises and privileges not granted to it, particularly in issuing and selling a certain form of investment security called by the defendant an "Accumulative Endowment Certificate." A copy of this certificate series A is hereafter given.

The defendant by answer and amendment to answer sets out in detail the manner of doing business by the defendant company, admits that it is issuing

the certificates series A, and says that it is also issuing certain other certificates series B, C and D, copies of which are hereafter given. The attorney general demurs to the answer upon the ground that the answer does not state facts sufficient to constitute a defense to the cause of action stated in the petition.

SERIES "A."

THE INTERSTATE SAVINGS INVESTMENT COMPANY.

General Offices, Cincinnati, Ohio.

By this accumulative endowment certificate does promise and agree to pay.....
or order, upon surrender, redemption or maturity of this certificate, or, in the event of death, pay the owner's heirs, or legal representatives, the amount as shown in the table of values herein, and in accordance with the terms and conditions herein, and the application herefor, which are hereby made a part and parcel of this certificate as fully as if recited over the signatures hereto attached.

In witness whereof, the said Interstate Savings Investment Company has by its duly authorized officers, signed, sealed and delivered, this contract this day of, one thousand nine hundred.....

(Seal.) S. A. STEVENS, President.
(Seal.) WM. R. SYPHER, Secretary.

TERMS AND CONDITIONS.

DUES—The dues on this certificate are twelve dollars per annum, but may be paid semi-annually, quarterly or monthly. All dues after the first payment must be paid at the main offices or to some properly authorized collector of the company, between the

hours of 9:00 A. M. and 5:00 P. M., on or before the 15th day of each month, beginning with the month following the date of this certificate.

FINES—An additional ten days of grace is allowed, with a fine of ten per cent., and if, at the expiration of the ten days, the fine and delinquent dues are not paid in full, the owner hereof forfeits all payments made hereon to the several funds to which they have been apportioned.

REMITTANCES—All remittances made on this certificate are made at the risk of the owner. If any remittances hereon be mailed on the 15th or 25th days of the month, and if the date of mailing be verified by the postoffice stamp, then this certificate shall not be subject to fine or forfeiture. When the 15th or 25th falls on Sunday or a legal holiday then the first business days respectively thereafter shall be regarded the same as the 15th and 25th of the month. No receipts for dues is valid without the signature of the treasurer, or of some one acting by his written authority.

APPORTIONMENT OF FUNDS—The first six months' payment are passed to the credit of the reserve and expense funds. All subsequent monthly dues, when paid, are apportioned to the several funds as follows: Sixty-five per cent. to the redemption fund; twenty per cent. to the reserve fund, and fifteen per cent. to the expense fund. All fines and transfer fees are passed to the credit of the reserve fund.

NON-FORFEITABLE—The monthly installments on this certificate, having been paid in full to and including the thirty-sixth month from the date of issuance hereof, shall render it non-forfeitable. Should the payment of dues on this certificate be continued after it had become non-forfeitable, it shall be considered a contributing, non-forfeitable certificate, and, if re-

deemed, shall be entitled to its endowment value, but should the payment of dues be discontinued at any time after the thirty-sixth month it shall be considered a non-contributing, non-forfeitable certificate, and will not be eligible for the cash surrender privilege, but must be held to be paid by special redemption or maturity and when paid will be entitled to its paid-up value only, at the time it became non-contributing.

REINSTATEMENT—Any non-forfeitable, non-contributing certificate can be reinstated as a contributing certificate by the payment of all back dues and a reinstatement fee equal to the accumulated fines, provided said certificate will not be reached by special redemption within one year, nor redeemed by regular redemption in the month in which the back dues are paid.

SURRENDER VALUE—Any time after one year, if this is a contributing certificate, the owner hereof may make application for its surrender value. If this certificate is one hundred and twenty months old or less, it will be paid out of the redemption fund, but if it is over one hundred and twenty months old, it will be paid out of the reserve fund its proportionate share of same, and the difference, if any, from the redemption fund. -

All dues must be paid until application is reached and paid. All cash surrenders have precedence over all other redemptions.

SPECIAL REDEMPTIONS—Not less than twenty per cent. of the total amount contributed to the redemption fund is applied every month to redeem in consecutive order the lowest numbered certificates in force, paying for their surrender, if non-contributing, their

paid-up value; or, if contributing certificates, their endowment value.

REGULAR REDEMPTIONS—The company reserves the right to call in and pay this certificate at any time previous to its maturity, by paying out of the redemption fund for its surrender, if a contributing certificate its endowment value. If a non-contributing, non-forfeitable certificate, it is not eligible to the regular redemption. In no case are certificates eligible for redemption until they have been in force seven months. The method used in this redemption is applied monthly and consists in paying certificates so many numbers apart, and in paying as many of them as the regular redemption fund will cover. The numbers of all certificates previously retired, are not considered in the count.

THE NUMERAL APART is determined each month by taking a percentage of the total number of contracts in force. The percentage used shall be the same as published in the bulletin the previous month, and can not be altered unless thirty days' notice has been given in the bulletin.

Having determined the numeral, the count is begun with the oldest certificate in force (after the surrender and special redemptions have been made for the month) and continues through as many live certificates as the numeral indicates, the last one counted being the one called in for payment.

Proceeding to count in like manner from the certificate so called in, the second one to be paid is reached; this method is continued until the sum of all the values of the certificates thus called in equals the amount in the regular redemption fund. The numeral for succeeding months is determined in the same way, and

the count begins from the last certificate called in and paid the month previous.

The directors reserve the right to modify this method of redemption at such a time, and in such a manner, as will in their judgment be to the best interests of all certificate holders.

LOANS—At any time after the last day of the twelfth month from the date of this certificate, all monthly installments due hereon having been paid in full, the owner may make application for a loan, not to exceed its reserve credit. This certificate will be accepted as collateral to a note for a loan and must be deposited with the company. The loan may be made at the option only of the company, and from any of its loanable funds. If the owner fail to keep this certificate in force, then, in default of a monthly payment due hereon, it shall immediately become due and payable out of the regular redemption fund for its surrender value. From the proceeds of said redemption, the note with all interest due thereon, shall first be paid; the remainder, if any, shall be paid to the owner, and the company shall be relieved from any other or further liability on this certificate, and the owner likewise shall be relieved from any further liability on this certificate, and the owner likewise shall be relieved from liability on his said note.

MATURITY—This certificate, if a contributing one, will mature and will be paid from the reserve fund when the amount to its credit in the reserve fund equals its endowment value, or if a non-contributing, non-forfeitable certificate, it will be paid when the amount to its credit in the reserve fund equals its paid-up value, at the time it became non-contributing.

TRANSFER—This certificate is transferable, but only on the books of the company. When a transfer is

desired, fill out one of the assignment blanks on the back of this certificate, with the name of the person to whom it is to be transferred, written on the first line; and the signature of the owner on the second line; then forward the certificate to the company to have the transfer recorded. A fee of one dollar is charged for the transfer of each certificate, and the fee must accompany the certificate.

DEATH OF OWNER—In the event of the death of the owner of this certificate, his legal representatives may, upon application within sixty (60) days after the date of death, avail themselves of any of the following options. All installments due hereon must be paid, according to contract, until the company has been notified which option has been accepted.

1st. Continue the payment of monthly dues until this certificate is redeemed or becomes non-forfeitable.

2d. Surrender the certificate at any time within six months from the date hereof, and receive in cash from the redemption fund the total amount paid hereon, exclusive of the first monthly payment.

3d. Surrender this certificate at any time after six months from the date hereof, and if a contributing one, receive in cash from the redemption fund its paid-up value, or if a non-contributing certificate its paid-up value at the time it became non-contributing.

Applications under options two and three, are considered as surrender redemptions. All applications are considered in the order of their receipt, and are paid out of a fund consisting, according to requirements, of not more than sixteen per cent. of the total redemption fund, for any one month.

When deaths for any one month require more than the total amount appropriated for this purpose then

those remaining unpaid are taken up in succeeding months in their regular order.

AUTHORITY OF AGENTS—No promises, representations, or agreements of any agent or employe, not contained herein, shall be of any binding force or effect on the company; and no agent or employe has any authority to change or modify in any manner whatever, the terms, regulations, conditions or provisions of this contract.

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TABLE OF VALUES.

1	2	3	4	1	2	3	4
No. of months.	Cash sur-render value.	Death benefit and paid-up value.	Endow-ment value.	No. of months.	Cash sur-render value.	Death benefit and paid-up value.	Endow-ment value.
7		\$ 7 14	\$ 3 35	65	\$ 48 45	\$ 78 87	\$130 00
8		8 19	9 80	66	49 50	80 30	128 00
9		9 24	11 25	67	50 55	81 74	124 00
10		10 30	12 80	68	51 65	83 19	126 00
11		11 37	14 35	69	53 70	84 64	128 00
12	\$ 6 00	12 44	16 00	70	55 80	86 10	140 00
13	6 55	13 52	17 70	71	54 90	87 57	125 00
14	7 10	14 61	19 45	72	56 00	89 04	144 00
15	7 70	15 70	21 25	73	57 10	90 52	145 00
16	8 30	16 80	23 10	74	58 25	92 01	148 00
17	8 90	17 91	25 00	75	59 35	93 50	150 00
18	9 50	19 02	27 00	76	60 50	95 00	153 00
19	10 10	20 14	29 00	77	61 65	96 51	154 00
20	10 75	21 27	31 10	78	62 85	98 05	156 00
21	11 35	22 40	33 20	79	64 00	99 54	158 00
22	12 00	23 54	35 40	80	65 20	101 07	160 00
23	12 65	24 69	37 65	81	66 35	102 60	162 00
24	13 35	25 34	39 85	82	67 55	104 14	164 00
25	14 00	27 00	42 30	83	68 80	105 69	166 00
26	14 70	28 17	44 75	84	70 00	107 24	168 00
27	15 35	29 34	47 20	85	71 20	108 80	170 00
28	16 05	30 52	49 75	86	72 45	110 37	172 00
29	16 80	31 71	52 30	87	73 70	111 94	174 00
30	17 50	32 90	54 95	88	74 95	113 53	176 00
31	18 20	34 10	57 60	89	76 20	115 11	178 00
32	18 95	35 31	60 35	90	77 50	116 70	180 00
33	19 70	36 52	63 15	91	78 80	118 30	182 00
34	20 45	37 74	66 00	92	80 05	119 91	184 00
35	21 20	38 97	68 85	93	81 35	121 52	186 00
36	22 00	40 20	72 00	94	82 70	123 14	188 00
37	22 50	41 44	74 00	95	84 00	124 77	190 00
38	23 55	43 09	76 00	96	85 35	126 40	192 00
39	24 35	43 94	78 00	97	86 65	128 04	194 00
40	25 20	45 20	80 00	98	88 00	129 69	196 00
41	26 00	46 47	82 00	99	89 35	131 34	198 00
42	26 85	47 74	84 00	100	90 75	133 00	200 00
43	27 65	49 02	86 00	101	92 10	134 67	202 00
44	28 50	50 31	88 00	102	93 50	136 34	204 00
45	29 35	51 60	90 00	103	94 90	138 02	206 00
46	30 25	52 90	92 00	104	96 30	139 71	208 00
47	31 10	54 21	94 00	105	97 70	141 40	210 00
48	32 00	55 52	96 00	106	99 15	143 10	212 00
49	32 50	56 84	98 00	107	100 55	144 81	214 00
50	33 40	58 17	100 00	108	102 00	146 52	216 00
51	34 35	59 50	102 00	109	103 45	148 24	218 00
52	35 30	60 84	104 00	110	104 90	149 97	220 00
53	36 25	62 19	106 00	111	106 35	151 70	222 00
54	37 20	63 54	108 00	112	107 85	153 44	224 00
55	38 15	64 90	110 00	113	109 35	155 19	226 00
56	39 10	66 27	112 00	114	110 85	156 94	228 00
57	40 05	67 74	114 00	115	112 35	158 70	230 00
58	41 00	69 08	116 00	116	113 85	160 47	232 00
59	42 00	70 41	118 00	117	115 35	162 24	234 00
60	43 00	71 80	120 00	118	116 90	164 02	236 00
61	44 00	73 20	122 00	119	118 45	165 81	238 00
62	45 00	74 61	124 00	120	120 00	167 60	240 00
63	46 00	76 02	126 00	121	121 55	169 40	242 00
64	47 00	77 44	128 00	122	123 10	171 21	244 00

Column 1. the number of months represent the number of dollars paid on

Series B.

No.

THE INTERSTATE SAVINGS INVESTMENT COMPANY.

General Offices, Cincinnati, Ohio.

By this accumulative endowment certificate does promise and agree to pay..... or order, upon surrender, redemption or maturity of this certificate, or, in the event of death, pay the owner's heirs, or legal representatives, the amount as shown in the table of values herein, and in accordance with the terms and conditions herein, and the application herefor, which are hereby made a part and parcel of this certificate as fully as if recited over the signatures hereto attached.

In witness whereof, the said Interstate Savings Investment Company has by its duly authorized officers, signed, sealed and delivered, this contract this day of, one thousand nine hundred.....

(Seal.)

S. A. STEVENS, President.

(Seal.)

WM. R. SYPHER, Secretary.

Such certificate, when sold and issued by the company to the purchaser, has filled into it, by an officer of the company, the name of the holder, together with the date of the purchase.

Upon the inside of said certificate are printed the terms and conditions attached to the investment certificate as printed upon its outside page one. Said terms and conditions are as follows:

TERMS AND CONDITIONS.

PREMIUM—The monthly premium on this certificate, originally issued with five coupons, is \$1.00 on each coupon, and must be paid at the main office or to a properly authorized collector of the company, between the hours of 9:00 A. M. and 5:00 P. M., and be-

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tween the 1st and 15th day of each month after date of issue, without notice. Premiums may be paid annually, semi-annually or quarterly, in advance. No premiums will be required or accepted after the one hundred and twentieth monthly premium has been paid.

FINES—If the premiums are not paid in accordance with the preceding clause, a fine of ten cents on each coupon is assessed, and if the fine and delinquent premium is not paid by the 25th of the month in which the premium is due, the owner forfeits all premiums paid hereon to the several funds to which they have been apportioned; except that this certificate may be reinstated within sixty days by the payment of the premiums due hereon and reinstatement fee of one dollar.

REMITTANCES—All remittances made on this certificate are made at the risk of the owner. If any remittances hereon be mailed on the 15th or 25th days of the month, and if the date of mailing be verified by the postoffice stamp, then this certificate shall not be subject to fine or forfeiture. When the 15th or 25th falls on Sunday or a legal holiday then the first business days respectively thereafter shall be regarded the same as the 15th and 25th of the month. No receipts for dues is valid without the signature of the treasurer, or of some one acting by his written authority.

APPORTIONMENT OF PREMIUMS—The first six months' premiums are passed to the credit of the reserve and expense funds; all subsequent premiums, when paid, are apportioned to a reserve, a redemption, and expense fund, with not more than ten per cent. to the expense fund, nor less than twenty-five per cent. to the reserve fund.

LIABILITY—The liability on this certificate shall be the reserve credits on its unretired coupons. The re-

serve credit on this certificate shall be not less than twenty-five per cent. of all premiums paid on its unretired coupons and the interest earnings thereon.

TONTINE FUND—The reserve contributions from retired coupons shall constitute the toptine fund. This fund, with its interest earnings, together with the reserve fund, shall be used to mature certificates.

SURPLUS FUND—All fines, transfer fees, reinstatement fees and interest thereon, shall constitute the surplus fund.

REDEMPTION FUND—The redemption fund is used to pay surrender values, death claims and endowment values before the coupons mature, taking precedence in the order named.

SURRENDER VALUE—At any time after one year from the date of this certificate, the owner may make application for the surrender value of the attached coupons, as per table of values printed thereon, provided the monthly premiums have been paid to date of application. All applications are considered in the order of their receipt, and paid out of the redemption fund, except after the 120th month, when the reserve and tontine funds apportioned to the credit of each coupon can be used. Should the redemption fund for any month be insufficient to pay all surrender values, then those remaining unpaid are taken up in succeeding months in their regular order. All premiums must be paid until the application is reached and paid.

DEATH—In the event of the death of the owner of this certificate, his legal representatives may, within sixty days after death, make application to the company for the endowment value at the time the application is made, as shown in the table printed hereon. All premiums due hereon must be paid according to contract until the application has been made. These

applications are considered in the order of their receipt, and are paid out of the redemption fund after all surrender values have been paid. Should the amount available in the redemption fund be less than the amount of death claims, then those remaining unpaid are taken up in succeeding months in their regular order. If this certificate has been transferred, the legal representatives must prove, to the satisfaction of the company, that the owner was in good health at the time the transfer was made.

REDEMPTIONS—The company reserves the right to call in coupons at any time after six months from date of issue, by paying for their surrender from the redemption fund their endowment value, as shown in the table of values printed hereon.

ORDER OF PAYMENT—When coupons are called in for redemption before maturity, the order of payment shall be one coupon on each certificate in consecutive order, beginning with the lowest numbered certificate and reverting when the highest numbered certificate eligible for redemption has been reached. The company reserves the right at any time to call in and redeem in consecutive order the oldest certificates in force.

MATURITY—The premiums having been paid in full on attached coupons to the one hundred and twentieth month inclusive, shall render said coupons eligible to mature, and they will be paid out of the reserve and tontine funds when the proportionate share each coupon has to its credit in these funds equals (\$192.00) one hundred and ninety-two dollars.

LOANS—At any time after the last day of the twelfth month from the date of this certificate, all monthly premiums due hereon having been paid in full, the owner may make application for a loan, not to exceed its liability. This certificate will be accepted as collateral to a note for the loan and must be de-

posited with the company. The loan may be made at the option only of the company, and from any of its loanable funds. If the owner fail to keep this certificate in force, then, in default of a monthly premium due hereon, it shall immediately become due and payable out of the redemption fund for its surrender value. From the proceeds of said redemption, the note, with all interest due thereon, shall first be paid; the remainder, if any, shall be paid to the owner, and the company shall be relieved from any other or further liability on this certificate, and the owner likewise shall be relieved from liability on his said note.

TRANSFER—This certificate is transferable, but only on the books of the company, and a fee of \$2.00 is charged. When a transfer is desired, fill out one of the assignment blanks on the back of this certificate, with the name of the person to whom it is to be transferred written on the first line, and the signature of the owner on the second line, then forward the certificate, together with the fee, to the company to have the transfer recorded.

AUTHORITY OF AGENTS—No promises, representations, or agreements of any agent or employe, not contained herein, shall be of any binding force or effect on the company; and no agent or employe has authority to change or modify in any manner whatever, the terms, regulations, condition or provisions of this contract.

LOSS—In case this certificate is lost, the owner may have a duplicate issued by making an affidavit upon a blank furnished by the company, and the payment of a fee of one dollar.

There is likewise printed into and as a part of the terms and conditions what is called a table of values, which indicates the value of such certificates upon the respective months of the existence of the certificate,

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in which said table there is no death benefit or paid-up value, the death benefit being the endowment value, and there is no paid-up value. Said table of value is as follows:

TABLE OF VALUES.

No. of months.	Cash surren-der value.	Endowment value.	No. of months.	Cash surren-der value.	Endowment value.
1	.....	\$ 1 00	61	\$ 44 35	\$79 61
2	.....	2 00	62	45 35	81 22
3	.....	3 00	63	46 35	82 75
4	.....	4 00	64	47 40	84 48
5	.....	5 00	65	48 45	86 13
6	.....	6 00	66	49 50	87 78
7	.....	7 25	67	50 55	89 45
8	.....	8 32	68	51 55	91 12
9	.....	9 41	69	52 70	92 81
10	.....	10 50	70	53 80	94 50
11	.....	11 61	71	54 90	96 21
12	6 99	12 72	72	55 99	97 92
13	6 55	13 55	73	57 10	99 65
14	7 10	14 98	74	58 35	101 38
15	7 77	16 13	75	59 35	103 13
16	8 30	17 28	76	60 50	104 88
17	8 90	18 45	77	61 55	106 65
18	9 50	19 62	78	62 55	108 43
19	10 10	20 81	79	64 00	110 21
20	10 75	22 00	80	65 20	112 00
21	11 35	23 21	81	66 35	113 81
22	12 00	24 42	82	67 55	115 62
23	12 65	25 65	83	68 80	117 45
24	13 35	26 88	84	70 00	119 30
25	14 00	28 13	85	71 30	121 13
26	14 70	29 38	86	72 45	122 98
27	15 35	30 65	87	73 70	124 85
28	16 05	31 92	88	74 95	126 72
29	16 80	33 21	89	76 20	128 61
30	17 50	34 50	90	77 50	130 50
31	18 20	35 81	91	78 80	132 41
32	18 65	37 12	92	80 05	134 32
33	19 70	38 45	93	81 35	136 25
34	20 45	39 78	94	82 70	138 18
35	21 20	41 13	95	84 00	140 13
36	22 00	42 48	96	85 35	142 08
37	22 80	43 85	97	86 55	144 05
38	23 55	45 22	98	88 00	146 02
39	24 35	46 61	99	89 35	148 01
40	25 20	48 00	100	90 75	150 00
41	26 09	49 41	101	92 10	152 01
42	26 85	50 82	102	93 50	154 05
43	27 65	52 25	103	94 90	156 05
44	28 50	53 68	104	96 30	158 08
45	29 35	55 13	105	97 70	160 13
46	30 25	56 58	106	99 15	162 18
47	31 10	58 05	107	100 55	164 25
48	32 58	59 52	108	102 00	166 32
49	32 90	61 01	109	103 45	168 41
50	33 80	62 50	110	104 90	170 50
51	34 70	64 01	111	106 35	171 61
52	35 65	65 52	112	107 85	174 72
53	36 55	67 05	113	109 35	176 85
54	37 50	68 58	114	110 85	178 98
55	38 45	70 13	115	112 35	181 13
56	39 40	71 68	116	113 85	183 28
57	40 35	73 25	117	115 35	185 45
58	41 35	74 82	118	116 90	187 62
59	42 35	76 41	119	118 45	189 81
60	43 35	78 00	120	120 00	192 00

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Attached to the certificate are printed five coupons, A, B, C, D and E, respectively, which said coupons are as follows:

CERTIFICATE No. SERIES B This Coupon will be called in and paid by the Interstate Savings Investment Company, In accordance with the Terms and Conditions, and for an amount as set forth in the Table of Values printed on attached Certificate. VOID IF DETACHED.	COUPON E
CERTIFICATE No. SERIES B This Coupon will be called in and paid by the Interstate Savings Investment Company, In accordance with the Terms and Conditions, and for an amount as set forth in the Table of Values printed on attached Certificate. VOID IF DETACHED.	COUPON D
CERTIFICATE No. SERIES B This Coupon will be called in and paid by the Interstate Savings Investment Company, In accordance with the Terms and Conditions, and for an amount as set forth in the Table of Values printed on attached Certificate. VOID IF DETACHED.	COUPON C
CERTIFICATE No. SERIES B This Coupon will be called in and paid by the Interstate Savings Investment Company, In accordance with the Terms and Conditions, and for an amount as set forth in the Table of Values printed on attached Certificate. VOID IF DETACHED.	COUPON B
CERTIFICATE No. SERIES B This Coupon will be called in and paid by the Interstate Savings Investment Company, In accordance with the Terms and Conditions, and for an amount as set forth in the Table of Values printed on attached Certificate. VOID IF DETACHED.	COUPON A

Series C.

No.

THE INTERSTATE SAVINGS INVESTMENT COMPANY.

General Offices, Cincinnati, Ohio.

By this accumulative endowment certificate does promise and agree to pay to..... or order, subject to the terms and conditions herein, and in the application herefor contained, at or before maturity of this certificate, an amount equal to all the payments made on said certificate, together with interest thereon at the rate of six (6%) per cent. per annum, and in addition thereto, a share of the net surplus earnings of said company to said certificate apportioned pro rata, not to exceed the amounts as shown in the schedule of values herein contained.

In witness whereof, the said Interstate Savings Investment Company has by its duly authorized officers, signed, sealed and delivered, this contract this day of, one thousand nine hundred.....

(Seal.), President.

(Seal.), Secretary.

Such certificate, when sold and issued by the company to the purchaser, has filled into it, by an officer of the company, the name of the holder, together with the date of the purchase.

Upon the inside of said certificate are printed the terms and conditions attached to the investment certificate as printed upon its outside page one. Said terms and conditions are as follows:

TERMS AND CONDITIONS.

PREMIUMS—This accumulative endowment certificate, is issued in consideration of the promise and written agreement in the application of the purchaser

hereof to pay a monthly premium of one dollar, until 120 of such monthly premiums shall be paid. Such monthly premiums must be paid at the main office or to a properly authorized collector of the company, between the hours of 9:00 A. M. and 5:00 P. M., on the first day of each month after date of issue, without notice. Provided, however, that if the first day of the month falls upon a Sunday or a legal holiday, said premiums are due between said hours on the first legal day thereafter. Premiums may be paid annually, semi-annually or quarterly, in advance.

FINES—If said premiums are not paid by 5 P. M. on the 15th day of the month, a fine of 10 cents will be assessed. If all delinquent premiums and fines assessed hereon are not paid at or before 5 P. M. on the 25th day of the month in which they are due, this certificate shall be deemed to be lapsed, and will not be eligible to participate in the redemption for the month for which the premium is in default, and all premiums paid hereon shall be forfeited to the funds respectively to which they have been apportioned. Provided, however, this certificate may be reinstated within sixty days, by the payment of the premiums due hereon and a reinstatement fee of twenty-five cents.

REMITTANCES—All remittances made on this certificate are made at the risk of the owner. If any remittances hereon be mailed on the 15th or 25th days of the month in which they are due, and if the date of mailing be verified by the postoffice stamp, then this certificate shall not be subject to a fine or forfeiture. When the 15th or 25th falls on a Sunday or a legal holiday, then the first business days respectively thereafter, shall be regarded the same as the 15th and 25th of the month. No receipt for premiums is valid

without the signature of the treasurer, or of some one acting by his written authority.

APPORTIONMENT OF PREMIUMS—The first six months' premiums are passed to the credit of the reserve and expense funds, provided, that not less than twenty-five per cent. thereof shall be passed to the credit of the reserve fund. All subsequent premiums are apportioned to the reserve, the redemption and the expense funds, as follows: Not less than twenty-five per cent., and such greater per cent. as shall be necessary to provide for the payment of this certificate at maturity, to reserve; not more than ten per cent. to expense; the balance to redemption.

RESERVE AND TONTINE FUNDS—The reserve contributions on unretired certificates shall constitute the reserve fund. The reserve contributions on retired certificates shall constitute the tontine fund. The tontine fund and reserve fund, together with their interest earnings, shall be used to retire matured certificates.

REDEMPTION FUND—The redemption fund shall be used, First, to retire certificates at cash surrender value; Second, to retire certificates at death surrender values; and Third, to redeem certificates at the redemption value, before maturity.

SURPLUS FUND—All fines, transfer fees, reinstatement fees and interest earnings thereon, shall constitute the surplus fund. Said fund shall be used in the discretion of the board of directors for the uses and purposes of the business of the company.

CLASSES—Certificates are issued in monthly classes, designated by the name of the month and year of their issue. The reserve and tontine funds created by each class are apportioned respectively to such class. When, by reason of the retirement of all of the certificates belonging to a class, the reserve fund of

that class has been passed to the credit of the tontine fund of that class, such tontine fund shall be apportioned to the tontine funds of all the classes having certificates unretired, upon the basis of the number of reserve contributions made by the classes respectively. Such distribution to be made only on December 31st of each year.

LIABILITY—The company's liability on this certificate shall be the amount of the reserve credits together with interest earnings thereon, and in addition, its proportionate share, of the tontine fund, including interest earned thereon, belonging to its class.

NON-FORFEITABLE—The monthly premiums on this certificate, having been paid in full to and including the thirty-sixth month from the date of issuance hereof, shall render it non-forfeitable. Should the payment of premiums hereon be continued after it has become non-forfeitable, it shall become a contributing, non-forfeitable certificate, and when redeemed, shall be entitled to its redemption value. Should the payment of premiums, be discontinued at any time after the thirty-sixth month, it shall be considered a non-contributing, non-forfeitable certificate, and it will not be eligible for the cash surrender privilege or for redemption, but must be held to be paid at maturity, and when paid will be entitled only to its guarantee value at the time it became non-contributing. Any non-contributing, non-forfeitable certificate, may be reinstated as a contributing one, by the payment of all back premiums and a reinstatement fee, equal to the accumulated fines, provided said certificate is not to be paid by the consecutive order of payment or maturity, within one year, nor redeemed in the month in which the back premiums are paid.

SURRENDER VALUE—At any time after one year from the date of this certificate, provided all prem-

iums have been paid in accordance with the terms hereof, the owner may make application for its cash surrender value; said value shall be the guaranteed cash surrender value, as per the table of values set forth herein. Applications will be paid in the order in which they are received, out of the redemption fund; except after 120 premiums have been paid, at which time the reserve and tontine funds to the amount of the liability of this certificate may be used. All premiums must be paid until the application is reached and paid, or until 120 premiums have been paid.

DEATH—In the event of death of the original owner of this certificate, his legal representatives may avail themselves of the following options:

1st. Continue the performance of this contract in the stead of said certificate owner, without the payment of transfer fee.

2nd. At any time within 60 days after death, make application in form required by the company, for the death surrender value of this certificate, which shall be the total amount of premiums paid hereon at the time said application is made. This option may be taken advantage of by the legal representatives of the original purchaser hereof only, and upon not to exceed fifty certificates.

All premiums due hereon must be paid according to this contract until such application has been made. Applications will be paid in order of their receipt, out of the redemption fund, after all cash surrender values have been paid. If the amount available in any month to pay all death claims be insufficient, then those unpaid are taken up in succeeding months in their regular order.

REDEMPTION—The company reserves the right to call in this certificate for redemption at any time after

six monthly premiums shall be paid hereon, and before maturity.

MATURITY—The 120 premiums having been paid in full on this certificate, shall render said certificate fully paid and eligible to mature, and it will be paid immediately out of the reserve and tontine funds, if the apportionate share to its credit in said funds, with the interest accumulations thereon, equals the total amount of payments hereon, together with interest at the rate of six per cent. per annum; otherwise, when the apportionate share to its credit in said fund, with the interest accumulations thereon, equals the total amount of the payments hereon, together with interest at the rate of six per cent. per annum; provided, however, that such date of payment shall not be later than the time when the sum of all premiums paid hereon, less not to exceed 10 per cent. thereof deducted for expenses, if said sum had been invested at the current rate of interest, compounded semi-annually, would equal the total amount of the premiums paid hereon, together with interest at the rate of six per cent. per annum. If this certificate be a non-contributing, non-forfeitable one, it will be eligible to mature at any time after one hundred and twenty months, when the amount to its credit in the reserve and tontine funds, equals the guarantee value at the time it became non-contributing.

LOANS—At any time after the last day of the twelfth month from the date of this certificate, all monthly premiums due hereon having been paid in full, the owner may make application for a loan, not to exceed its liability, on December 31st, preceding. This certificate will be accepted as collateral to a note for the loan and must be deposited with the company. The loan may be made only at the option of the company, and from any of its loanable funds. If the

owner fail to keep this certificate in force, then, in default of a monthly premium due hereon, it shall immediately become due and payable out of the redemption fund, for its surrender value. From the proceeds of said redemption, the note with all interest due thereon, shall first be paid; the remainder, if any, shall be paid to the owner, and the company shall be relieved from any other or further liability on this certificate, and the owner likewise shall be relieved from liability on his said loan and note.

TRANSFER—This certificate is transferable, but only on the books of the company, and a fee of \$1.00 is charged. When a transfer is desired, fill out one of the assignment blanks on the back of this certificate, with the name of the person to whom it is to be transferred written on the first line, and the signature of the owner on the second line, then forward the certificate, together with the fee, to the company to have the transfer recorded.

LOSS—In case this certificate is lost or destroyed, the owner may have a duplicate issued by making an affidavit upon a blank furnished by the company, and the payment of a fee of one dollar.

AUTHORITY OF AGENTS—No promises, representations, or agreements of any officer, agent or employe, not contained herein shall be of any binding force or effect on the company; and no officer, agent or employe has any authority to change or modify in any manner whatever, the terms, regulations, conditions or provisions of this contract.

There is likewise printed into and as a part of the terms and conditions what is called a table of values, which indicates the value of such certificate upon the respective months of the existence of the certificate, there being first the guaranteed value; second, the es-

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timated maximum endowment value, and third the cash surrender value of such certificate.

Said table of values is as follows:

TABLE OF VALUES.

Month.	G'rant'd value.	Estimated maximum endowment value.	Cash surrender value.	Month.	G'rant'd value.	Estimated maximum endowment value.	Cash surrender value.
1				61	\$ 70 15	\$ 85 78	\$44 35
2				62	71 45	87 67	45 35
3				63	72 76	89 60	46 30
4				64	74 08	91 55	47 46
5				65	75 40	93 52	48 40
6				66	76 72	95 52	49 55
7	7 10	\$ 7 30		67	78 05	97 53	50 55
8	8 14	8 39		68	79 39	99 56	51 60
9	9 18	9 49		69	80 73	101 62	52 70
10	10 22	10 60		70	82 07	103 70	53 80
11	11 27	11 72		71	83 42	105 80	54 90
12	12 32	12 85	\$ 6 58	72	84 78	107 92	56 00
13	13 39	14 00	6 55	73	86 14	110 06	57 15
14	14 45	15 15	7 10	74	87 50	112 23	58 25
15	15 52	16 32	7 70	75	88 87	114 42	59 30
16	16 60	17 51	8 30	76	90 25	116 63	60 55
17	17 68	18 70	8 90	77	91 63	118 86	61 65
18	18 76	19 91	9 50	78	93 01	121 12	62 85
19	19 85	21 13	10 10	79	94 40	123 41	64 00
20	20 95	22 36	10 75	80	95 80	125 71	65 25
21	22 05	23 60	11 35	81	97 20	128 04	66 25
22	23 15	24 86	12 00	82	98 60	130 40	67 50
23	24 25	26 13	12 65	83	100 01	132 78	68 80
24	25 35	27 42	13 30	84	101 42	135 18	70 00
25	26 50	28 72	14 00	85	102 85	137 61	71 20
26	27 62	30 08	14 70	86	104 27	140 07	72 40
27	28 75	31 35	15 35	87	105 70	142 56	73 70
28	29 89	32 69	16 05	88	107 14	145 06	74 55
29	31 03	34 05	16 80	89	108 58	147 59	76 50
30	32 17	35 42	17 50	90	110 02	150 15	77 50
31	33 32	36 80	18 20	91	111 47	152 74	78 80
32	34 48	38 20	18 95	92	112 93	155 36	80 05
33	35 64	39 61	19 70	93	114 39	157 99	81 35
34	36 80	41 03	20 45	94	115 85	160 66	82 70
35	37 97	42 48	21 20	95	117 32	163 36	84 00
36	39 15	43 93	22 00	96	118 80	166 08	85 25
37	40 33	45 40	22 80	97	120 28	168 84	86 65
38	41 51	46 89	23 55	98	121 76	171 62	88 00
39	42 70	48 39	24 35	99	123 25	174 44	89 25
40	43 90	49 91	25 20	100	124 75	177 28	90 75
41	45 10	51 45	26 00	101	126 25	180 15	92 10
42	46 30	53 00	26 85	102	127 75	183 06	93 50
43	47 51	54 56	27 65	103	129 25	185 98	94 90
44	48 73	56 15	28 50	104	130 78	188 95	96 30
45	49 95	57 76	29 35	105	132 30	191 94	97 70
46	51 17	59 38	30 25	106	133 82	194 97	99 15
47	52 40	61 00	31 10	107	135 35	198 02	100 55
48	53 64	62 65	32 00	108	136 89	201 11	102 00
49	54 88	64 32	32 90	109	138 43	204 24	103 45
50	56 12	66 00	33 80	110	139 97	207 39	104 90
51	57 37	67 71	34 70	111	141 52	210 56	106 35
52	58 63	69 43	35 65	112	143 08	213 80	107 85
53	59 89	71 17	36 55	113	144 64	217 06	109 35
54	61 15	72 93	37 50	114	146 20	220 36	110 85
55	62 42	74 70	38 45	115	147 77	223 67	112 35
56	63 70	76 50	39 40	116	149 35	227 03	113 85
57	64 98	78 31	40 35	117	150 93	230 42	115 35
58	66 26	80 14	41 25	118	152 51	233 85	116 90
59	67 55	82 00	42 25	119	154 10	237 32	118 45
60	68 86	83 87	43 25	120	155 70	240 83	120 00

In Column 1, the number of months also represents the number of dollars.

Series D.

No.

THE INTERSTATE SAVINGS INVESTMENT COMPANY.

General Offices, Cincinnati, Ohio.

By this accumulative endowment certificate does promise and agree to pay to..... or order, subject to the terms and conditions herein, and in the application herefor contained, at or before maturity of the coupons hereto attached, an amount equal to all the payments made on said coupons respectively, together with interest thereon at the rate of four (4%) per cent. per annum, and in addition thereto, a share of the net surplus earnings of said company to said coupons apportioned pro rata respectively, not to exceed the amounts as shown in the schedule of values herein contained.

In witness whereof, the said Interstate Savings Investment Company has by its duly authorized officers, signed, sealed and delivered, this contract this day of, one thousand nine hundred.....

(Seal.), President.

(Seal.), Secretary.

Such certificate, when sold and issued by the company to the purchaser, has filled into it, by an officer of the company, the name of the holder, together with the date of the purchase.

Upon the inside of said certificate are printed the terms and conditions attached to the investment certificate as printed upon its outside page one. Said terms and conditions are as follows:

TERMS AND CONDITIONS.

PREMIUMS—This accumulative endowment certificate, with five coupons attached, is issued in consid-

eration of the promise and written agreement in the application of the purchaser hereof to pay a monthly premium of \$1.00 per coupon on each coupon attached hereto, until 120 of such monthly premiums shall be paid. Provided, however, that when any of said coupons are redeemed or otherwise retired, monthly premiums on such coupons shall then cease. Such monthly premiums must be paid at the main office or to a properly authorized collector of the company, between the hours of 9:00 A. M. and 5:00 P. M., on the first day of each month after date of issue, without notice. Provided, however, if the first day of the month falls upon a Sunday or a legal holiday, said premiums are due between said hours on the first legal day thereafter. Premiums may be paid annually, semi-annually or quarterly, in advance.

FINES—If said premiums are not paid by 5 P. M. on the 15th day of the month, a fine of 10 cents per coupon will be assessed. If all delinquent premiums and fines assessed on the coupons hereon are not paid at or before 5 P. M. on the 25th day of the month in which they are due, this certificate shall be deemed to be lapsed, and will not be eligible to participate in the redemption for the month for which the premium is in default, and all premiums paid hereon shall be forfeited to the funds respectively to which they have been apportioned. Provided, however, this certificate may be reinstated within sixty days, by the payment of the premiums due hereon and a reinstatement fee of one dollar.

REMITTANCES—All remittances made on this certificate are made at the risk of the owner. If any remittances hereon be mailed on the 15th or 25th days of the month in which they are due, and if the date of mailing be verified by the postoffice stamp, then

this certificate shall not be subject to a fine or forfeiture. When the 15th or 25th falls on a Sunday or a legal holiday, then the first business days respectively thereafter, shall be regarded the same as the 15th and 25th of the month. No receipt for premiums is valid without the signature of the treasurer, or of some one acting by his written authority.

APPORTIONMENT OF PREMIUMS—The first six months' premiums are passed to the credit of the reserve and expense funds, provided, that not less than twenty-five per cent. thereof shall be passed to the credit of the reserve fund. All subsequent premiums are apportioned to the reserve, the redemption and the expense funds, as follows: Not less than twenty-five per cent., and such greater per cent. as shall be necessary to provide for the payment of the coupons hereto attached at maturity, to reserve; not more than ten per cent. to expense; the balance to redemption.

RESERVE AND TONTINE FUNDS—The reserve contributions on unretired coupons shall constitute the reserve fund. The reserve contributions on retired coupons shall constitute the tontine fund. The tontine fund and reserve fund, together with their interest earnings, shall be used to retire matured coupons.

REDEMPTION FUND—The redemption fund shall be used, First, to retire coupons at cash surrender values; Second, to retire coupons at death surrender values; and, Third, to redeem coupons in accordance with the method of redemption hereinafter set forth.

SURPLUS FUND—All fines, transfer fees, reinstatement fees and interest earnings thereon, shall constitute the surplus fund. Said fund shall be used in the discretion of the board of directors for the uses and purposes of the business of the company.

CLASSES—Certificates are issued in monthly classes, designated by the name of the month and year of their issue. The reserve and tontine funds created by each class are apportioned respectively to such class. When, by reason of the retirement of all of the coupons belonging to a class, the reserve fund of that class has been passed to the credit of the tontine fund of that class, such tontine fund shall be apportioned to the tontine funds of all the classes having coupons unretired, upon the basis of the number of reserve contributions made by the classes respectively. Such distribution to be made only on December 31st of each year.

LIABILITY—The company's liability on this certificate shall be the amount of the reserve credits together with interest earnings thereon, on its unretired coupons and in addition, based upon the number of its unretired coupons, its proportionate share of the tontine fund, including interest earned thereon, belonging to its class.

NON-FORFEITABLE—The monthly premiums on coupons attached to this certificate, having been paid in full to and including the thirty-sixth month from the date of issuance hereof, shall render it non-forfeitable. Should the payment of premiums hereon be continued after it has become non-forfeitable, it shall become a contributing, non-forfeitable certificate, and the coupons, when redeemed, shall be entitled to their redemption value. Should the payment of premiums be discontinued at any time after the thirty-sixth month, it shall be considered a non-contributing, non-forfeitable certificate, and the coupons will not be eligible for the cash surrender privilege or for redemption, but must be held to be paid at

maturity, and when paid will be entitled only to the amount paid in premiums on attached coupons.

SURRENDER VALUE—At any time after one year from the date of this certificate, provided all premiums have been paid in accordance with the terms hereof, the owner may make application for the cash surrender value of the attached coupons; said value shall be the guaranteed cash surrender value, as per the table of values set forth herein. Applications will be paid in the order in which they are received, out of the redemption fund; except after 120 premiums have been paid, at which time the reserve and tontine funds to the amount of the liability of this certificate may be used. All premiums must be paid until the application is reached and paid, or until 120 premiums have been paid.

DEATH—In the event of death of the original owner of this certificate, his legal representatives may avail themselves of the following options:

1st. Continue the performance of this contract in the stead of said deceased certificate owner, without the payment of transfer fee.

2nd. At any time within 60 days after death, make application in form required by the company, for the death surrender value of this certificate, which shall be the total amount of premiums paid on its unretired coupons at the time said application is made. This option may be taken advantage of by the legal representatives of the original purchaser hereof only, and upon not to exceed fifty coupons.

All premiums due hereon must be paid according to this contract until such application has been made. Applications will be paid in order of their receipt, out of the redemption fund, after all cash surrender values have been paid. If the amount available in any

month to pay all death claims be insufficient, then those unpaid are taken up in succeeding months in their regular order.

REDEMPTION—The company reserves the right to call in for redemption any or all of the coupons attached to this certificate at any time after six monthly premiums shall be paid thereon, and before maturity. When coupons are called in for redemption before maturity, the order of payment shall be one coupon on each certificate in consecutive order, beginning with the lowest numbered certificate and reverting when the highest numbered certificate eligible for redemption has been reached. The company reserves the right at any time to call in and redeem in consecutive order, the oldest certificates in force.

MATURITY—The 120 premiums having been paid in full on the attached coupons, shall render said coupons fully paid and eligible to mature, and they will be paid immediately out of the reserve and tontine funds, if the apportionate share to the credit of each coupon in said funds, with the interest accumulations thereon, equals the total amount of the payments on such coupons, together with interest at the rate of four per cent. per annum; otherwise when the apportionate share to the credit of each coupon in said fund, with the interest accumulations thereon, equals the total amount of the payments on such coupons, together with interest at the rate of four per cent. per annum; provided, however, that such date of payment shall not be later than the time when the sum of all of the premiums paid on the unretired coupons hereon, less not to exceed 10 per cent. thereof deducted for expenses, if said sum had been invested at the current rate of interest, compounded semi-annually, would equal the total amount of the premiums paid on such

unretired coupons, together with interest at the rate of four per cent. per annum. If this certificate be a non-contributing, non-forfeitable one, the coupons attached hereto, will be eligible to mature at any time after one hundred and twenty months, when the amount to their credit in the reserve and tontine funds, equals the amount paid as premiums thereon.

LOANS—At any time after the last day of the twelfth month from the date of this certificate, all monthly premiums due hereon having been paid in full, the owner may make application for a loan, not to exceed its liability, on December 31st, preceding. This certificate will be accepted as collateral to a note for the loan and must be deposited with the company. The loan may be made only at the option of the company, and from any of its loanable funds. If the owner fail to keep this certificate in force, then, in default of a monthly premium due hereon, it shall immediately become due and payable out of the redemption fund, for its surrender value. From the proceeds of said redemption, the note with all interest due thereon, shall first be paid; the remainder, if any, shall be paid to the owner, and the company shall be relieved from any other or further liability on this certificate, and the owner likewise shall be relieved from liability on his said loan and note.

TRANSFER—This certificate is transferable, but only on the books of the company, and a fee of \$2.00 is charged. When a transfer is desired, fill out one of the assignment blanks on the back of this certificate, with the name of the person to whom it is to be transferred written on the first line, and the signature of the owner on the second line, then forward the certificate, together with the fee, to the company to have the transfer recorded.

LOSS—In case this certificate is lost or destroyed, the owner may have a duplicate issued by making an affidavit upon a blank furnished by the company, and the payment of a fee of one dollar.

AUTHORITY OF AGENTS—No promises, representations, or agreements of any officer, agent or employe, not contained herein shall be of any binding force or effect on the company; and no officer, agent or employe has any authority to change or modify in any manner whatever, the terms, regulations, conditions or provisions of this contract.

There is likewise printed into and as a part of the terms and conditions what is called a table of values, which indicates the value of such certificates upon the respective months of the existence of the certificate, in which said table there is no death benefit or paid-up value, the death benefit being the endowment value, and there is no paid-up value. Said table of value is as follows :

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TABLE OF VALUES FOR EACH COUPON.

Month.	Grant'd value.	Estimated maximum endowm't value.	Cash surrender value.	Month.	Grant'd value.	Estimated maximum endowm't value.	Cash surrender value.
1				61	67 10	77 57	44 35
2				62	68 30	79 16	45 35
3				63	69 51	80 76	46 35
4				64	70 72	82 37	47 40
5				65	71 93	84 00	48 45
6				66	73 15	85 64	49 50
7	7 07	7 21		67	74 37	87 29	50 55
8	8 09	8 27		68	75 59	88 96	51 65
9	9 12	9 34		69	76 82	90 63	52 70
10	10 15	10 42		70	78 05	92 31	53 80
11	11 18	11 52		71	79 28	94 01	54 90
12	12 22	12 61	6 00	72	80 52	95 72	56 00
13	13 26	13 71	6 55	73	81 76	97 45	57 10
14	14 30	14 82	7 10	74	83 00	99 19	58 25
15	15 35	15 94	7 70	75	84 25	100 94	59 39
16	16 40	17 07	8 30	76	85 50	102 70	60 50
17	17 45	18 21	8 90	77	86 75	104 48	61 65
18	18 51	19 35	9 50	78	88 01	106 27	62 85
19	19 57	20 50	10 10	79	89 27	108 09	64 00
20	20 68	21 66	10 75	80	90 53	109 89	65 20
21	21 70	22 83	11 37	81	91 80	111 73	66 35
22	22 77	24 01	12 00	82	93 07	113 67	67 55
23	23 84	25 20	12 65	83	94 34	115 43	68 80
24	24 92	26 40	13 25	84	95 62	117 39	70 00
25	26 00	27 60	14 00	85	96 90	119 19	71 20
26	27 08	28 82	14 70	86	98 18	121 09	72 45
27	28 17	30 04	15 35	87	99 47	123 01	73 70
28	29 26	31 17	16 05	88	100 76	124 94	74 95
29	30 35	32 51	16 80	89	102 05	126 88	76 20
30	31 45	33 77	17 50	90	103 35	128 84	77 50
31	32 55	35 08	18 20	91	104 65	130 81	78 80
32	33 65	36 30	18 95	92	105 95	132 80	80 05
33	34 76	37 58	19 70	93	107 26	134 81	81 35
34	35 87	38 87	20 45	94	108 57	136 83	82 70
35	36 98	40 17	21 20	95	109 88	138 86	84 00
36	38 19	41 47	22 00	96	111 20	140 91	85 35
37	39 22	43 79	22 80	97	112 52	142 97	86 65
38	40 34	44 12	23 55	98	113 84	145 05	88 05
39	41 47	45 46	24 35	99	115 17	147 15	89 35
40	42 60	46 81	25 20	100	116 50	149 26	90 75
41	43 73	48 17	26 00	101	117 83	151 39	92 10
42	44 87	49 54	26 85	102	119 17	153 53	93 50
43	46 01	50 91	27 65	103	120 51	155 69	94 90
44	47 15	52 30	28 50	104	121 85	157 86	96 30
45	48 30	53 70	29 35	105	123 20	160 05	97 70
46	49 45	55 11	30 25	106	124 55	162 26	99 15
47	50 60	56 53	31 10	107	125 90	164 49	100 55
48	51 78	57 97	32 00	108	127 26	166 76	102 00
49	52 92	59 41	32 80	109	128 62	169 09	103 45
50	54 08	60 86	33 80	110	129 98	171 36	104 90
51	55 25	62 38	34 70	111	131 35	173 65	106 35
52	56 43	63 79	35 65	112	132 72	175 96	107 85
53	57 59	65 27	36 55	113	134 09	178 19	109 35
54	58 77	66 77	37 50	114	135 47	180 53	110 85
55	59 96	68 28	38 55	115	136 85	182 89	112 35
56	61 13	69 80	39 40	116	138 23	185 27	113 85
57	62 33	71 33	40 35	117	139 62	187 67	115 35
58	63 51	72 87	41 35	118	141 01	190 08	116 90
59	64 70	74 43	42 35	119	142 40	192 52	118 45
60	65 90	75 93	43 35	120	143 80	194 97	120 00

In Column 1, the number of months also represents the number of dollars.

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Attached to the certificates are printed five coupons, A, B, C, D and E, respectively, which said coupons are as follows:

<p>Certificate No. Series D</p> <p>This Coupon will be called in and paid by the</p> <p>Interstate Savings Investment Company</p> <hr/> <p>In accordance with the Terms and Conditions set forth in the attached Certificate : : :</p> <p>VOID IF DETACHED</p>	<p>COUPON</p> <p>E</p>
<p>Certificate No. Series D</p> <p>This Coupon will be called in and paid by the</p> <p>Interstate Savings Investment Company</p> <hr/> <p>In accordance with the Terms and Conditions set forth in the attached Certificate : : :</p> <p>VOID IF DETACHED</p>	<p>COUPON</p> <p>D</p>
<p>Certificate No. Series D</p> <p>This Coupon will be called in and paid by the</p> <p>Interstate Savings Investment Company</p> <hr/> <p>In accordance with the Terms and Conditions set forth in the attached Certificate : : :</p> <p>VOID IF DETACHED</p>	<p>COUPON</p> <p>C</p>
<p>Certificate No. Series D</p> <p>This Coupon will be called in and paid by the</p> <p>Interstate Savings Investment Company</p> <hr/> <p>In accordance with the Terms and Conditions set forth in the attached Certificate : : :</p> <p>VOID IF DETACHED</p>	<p>COUPON</p> <p>B</p>
<p>Certificate No. Series D</p> <p>This Coupon will be called in and paid by the</p> <p>Interstate Savings Investment Company</p> <hr/> <p>In accordance with the Terms and Conditions set forth in the attached Certificate : : :</p> <p>VOID IF DETACHED</p>	<p>COUPON</p> <p>A</p>

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John M. Sheets, Attorney General, *J. E. Todd*, *Smith W. Bennett* and *Swing, Cushing & Morse*, for plaintiff.

Charles W. Baker, *Michael G. Heintz* and *Dwight Harrison*, for defendant.

Dyer, Williams & Stouffer, for A. W. Dorbert, a debenture holder.

DAVIS, J. The attorney general makes his contention for ousting the defendant from the privilege of doing business in Ohio, on the provisions of certain contracts, or debentures, denominated by the defendant company "Accumulative Endowment Certificates," distinguished as series A, series B, series C, and series D. It is claimed that the defendant has misused its corporate franchises and privileges in issuing these debentures, because they are upon the face of them, in contravention of law. It is insisted on the part of the relator, that some, at least, of these debentures are vitiated by containing elements of chance and prize so as to constitute a lottery scheme, and that all of them are calculated to deceive and defraud an unsuspecting public. The question here is not whether the promoters of the defendant company have intentionally devised a scheme to mislead and defraud; but whether that is the effect of it. The promoters and the investors may be self-deluded, or satisfied to take the chances offered; but that does not alter the character of the scheme. If the company is misusing its corporate privileges in such way as to be a public abuse, the writ must issue regardless of the intent. Nor are we now called upon to draw the line of demarcation between such insurance and investment methods as have been approved by the law and the schemes now under consideration. We are

not considering life insurance methods, tontine or other, building and loan associations, or investment companies in general. We are only concerned with the question whether the methods of this company are lawful or not. In this connection we recur to the averment in the answer to the effect that the defendant has literally complied with the requirements of an act of the legislature of Ohio "to regulate certificate bond and investment companies, partnerships and associations, other than building and loan companies, and to regulate investment guaranty companies, partnerships and associations doing business on the service dividend plan, and to protect holders of their certificates, debentures and securities," and that the defendant has received from the secretary of state the certificates authorized by that act. If this averment was inserted in the answer with the understanding that compliance with the statute referred to legalized the financial schemes now under consideration, it is based on an erroneous theory. The legislature is presumed to have contemplated that a corporation thus authorized to do business in this state would exercise its franchises within chartered limits, and in a manner not injurious to the public. *Leslie v. Lorillard*, 110 N. Y., 531; *People v. North River Sugar Refining Co.*, 121 N. Y., 582. This law was enacted expressly to regulate bond and investment companies and to protect the holders of their certificates. The legislature could not, and did not assume to, exercise judicial power by declaring that acts or contracts of such companies, which are inherently immoral and prejudicial to the public welfare or unconstitutional should be lawful. Nor did the legislature undertake to declare public policy in regard to bond and investment companies further than that

they should be regulated and that the holders of their securities should be in some measure protected.

It would serve no good purpose to detail the processes by which we have reached our conclusions after having carefully considered all of the elaborate arguments which have been submitted.

An inspection of the different classes of "accumulative endowment certificates" issued by the defendant, discloses that in none of them does a certificate absolutely and certainly mature within any fixed and definite period; yet the certificates are all so drawn as to create the expectation, and to make it appear, that they will mature in a period of one hundred and twenty months. With all the light which we have received from counsel and other sources, we have been unable to persuade ourselves that the credit, to any of these classes of certificates, in the reserve fund, or in the reserve and tontine funds, will equal the endowment value within the stipulated periods, without the aid of lapses or the apportionment of funds derived from new business. Indeed it is almost self-evident that with seventy-five or eighty per cent. of the premiums received consumed in expenses and monthly redemptions, the reserve credits could not equal the endowment value in several times the periods stipulated. In other words, twenty or twenty-five per cent. of the premiums, with its interest earnings, alone and unaided by lapses or the appropriation of money from premiums received for new business, will not sufficiently accumulate to equal the represented endowment value in the stipulated periods. A little calculation applied to the representations in any of these tables of values will demonstrate this proposition. If this deficiency in the reserve should be made up by appropriating premiums received on new business, it is ob-

vious that in redeeming the old obligations new and greater ones are created, making the possibility of ultimate redemption of all the obligations still more problematical. But if the deficiency should be made up by lapses or forfeitures, it is equally clear that the lapses must be very numerous, so numerous in fact as to eventually destroy the credit of the company and bring ruin upon it. A scheme which can succeed only by lapses is manifestly a scheme which will enrich some at the expense of others who embark in the same enterprise. It holds out the inducement that those who may be strong enough to survive will find their profit in the weakness, the misfortunes and the discouragements which cause a larger number of their associates to fall by the way. Moreover, since the salvation of the company depends on these lapses, it necessarily tends to encourage and produce them. True enough, all of these certificates are non-forfeitable after thirty-six monthly payments; but that only signifies that a larger number must fail in the first three years or that the whole scheme must fail, for the vice of the plan is, not that some may fail, but that many must fail in order that all continuing certificates shall mature. Formerly the profits from this source to life insurance companies were understood to be very large and public attention being drawn to it, in many of the states laws regulating the non-forfeiture of policies were enacted; and such has been the force of public opinion, and public policy as expressed in these statutes, that it is believed that no standard company can be found which counts upon lapses as a necessary element in determining its ability to carry out its contracts; and all such companies so calculate as to carry out

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their contracts even should no lapses occur, except perhaps in some forms of tontine insurance. Indeed there is no fixed rate or percentage of lapses which can be used as a basis of calculation. The percentage of lapses varies with different companies, and at different times with the same company. Shall this fallacious and uncertain element, which has thus been in so large a measure eliminated from legitimate business methods, be encouraged to reappear and to delude the inexperienced and the unwary? We cannot conceive it to be our duty to lend such encouragement.

But wherein is the chief attraction held out to the public by the defendant? In series A the certificates, or rather some of them, are liable to be matured fortuitously at periods more or less extended from the time of their issue. This is done by taking a percentage of the total number of contracts in force each month. This percentage, it must be observed, will be as variable and uncertain as the contingencies of business will make it. The numeral being thus determined the certificates are arbitrarily matured by beginning the count "with the oldest certificate in force (after the surrender and special redemptions have been made for the month) and continued through as many live certificates as the numeral indicates, the last one counted being the one called in for payment. Proceeding to count in like manner from the certificates so called in, the second one to be paid is reached; this method is continued until the sum of all the values of the certificates thus called in equals the amount in the regular redemption fund." Turning now to the table of values in series A, we find that if a certificate is so redeemed at the end of twelve

months the holder will receive \$4.00 more than he has paid, that is 66 2-3 per cent. per annum simple interest on his investment for an average of six months. If a certificate should be redeemed at the end of twenty-four months the holder's profit would still be 66 2-3 per cent. per annum upon his investment for an average of twelve months. If a certificate should be redeemed at the end of thirty-six months the holder's profit would still be 66 2-3 per cent. per annum upon his investment for an average of eighteen months. From this point, the point at which the certificates become non-forfeitable, the percentage of profit decreases until at the one hundred and twentieth month it has gone down to 20 per cent. per annum simple interest on an investment of \$120.00 for an average of five years. The rate of profit being unequal, the prize in this scheme is a large profit and quick return to the fortunate holder of a certificate selected for redemption, and the gaining chance is that his certificate will be called in for early redemption by the "numeral-apart" system of selection. Yet in face of all this counsel ask: "How can a scheme be a lottery in which there are no blanks and all investors for the payment of the same sums receive the same prize?" The blanks are all the numbers included in the extent of the "numeral-apart," except the last one, which draws a prize, and the prize is pointed out above. Our conclusion is that series A is a lottery and unlawful, and that none of the schemes of defendant, as shown in certificates of series A, B, C and D will legitimately "finance out," as represented. It follows that the demurrer to the answer should be sustained and that the prayer of the relator should be granted.

French, Treasurer, v. Bobe, Assignee.

It should be added as the opinion of the whole court that it is the duty of the state treasurer to hold and distribute the fund deposited with him, in trust for the holders of the debentures in this state, according to the amount that may be found due to each one.

Judgment of ouster.

MINSHALL, C. J., WILLIAMS, BURKET AND SPEAR, JJ., concur.

FRENCH, TREASURER, v. BOBE, ASSIGNEE.

Personal property in hands of assignee for creditors—Of manufacturing corporation—Being held and operated as before by corporation itself—Is subject to taxation and should be listed by assignee.

Personal property in the possession of an assignee for the benefit of creditors of a manufacturing corporation, which is not being reduced to money for distribution among the creditors of the corporation, but is being held and operated, under the orders of the insolvency court, and at the joint request of the creditors of the assignee, in the conduct of a going business, such business being conducted as it had been theretofore by the corporation itself, is subject to taxation, and it is the duty of the assignee to list such property for taxation.

(Decided March 26, 1901.)

ERROR to the Circuit Court of Hamilton county.

Tilden R. French, plaintiff in error, is the treasurer of Hamilton county. John B. Bobe, defendant in error, is the assignee in insolvency of The Jackson Brewing Company, a corporation having its principal place of business in the city of Cincinnati. The controversy out of which comes the present error proceeding arose in the court of insolvency of Hamilton

county by the filing in that court, April 22, 1897, by French, as treasurer, of an application for an order upon the assignee to require him to pay certain state and county taxes upon personalty charged against him as such assignee on the duplicate of Hamilton county for the years 1894, 1895 and 1896, and that he be further ordered and directed to make a correct return of all the property, moneys and credits in his hands for taxation for the year 1897. Issue was made up by answer and reply, and a trial had and judgment rendered in favor of the assignee, denying the application, from which the treasurer appealed to the court of common pleas. That court upon trial, June 8, 1899, found the following facts, viz:

"1. On the 3rd day of March, 1894, The Jackson Brewing Company, a corporation, operating a brewery and doing business in the city of Cincinnati, Hamilton county, Ohio, and being unable to pay its debts, filed its deed of assignment pursuant to the insolvent laws of the state of Ohio in the probate court of said county to John B. Bobe, assignee, for the benefit of its creditors, who accepted the trust and duly qualified as said assignee.

"2. Upon the request and with the consent of all the creditors of the said Jackson Brewing Company, and pursuant to the orders of the said court made for that purpose, the said assignee was authorized immediately after the assignment to continue and did continue the business of the Company in the manufacture and sale of beer in the usual and ordinary way; and the assignee, ever since said time, has continued so to operate the business of said Company, and is still doing so, the debts of said Company having not yet been paid.

"3. When the assignment was made the brewery plant and property was in very bad condition, and incapable, without repairs and improvements, of successful operation. The assignee borrowed money and put it into the plant, to make it capable of operation, since which the operation of the brewery has been profitable. The assignee has paid the operating expenses, and repaid the costs of repairs and improvements from the earnings. He has also, from the earnings, paid off about 50 per cent. of the admitted mortgage debts of The Jackson Brewing Company, under orders of said court, but no part of the general and unsecured debts and liabilities thereof have yet been paid, or sufficient realized to pay any part thereof. The brewery plant has not yet been converted into money, but some of the assets have been. There is a suit pending, on proceedings in error in the Supreme Court of Ohio, involving the question as to whether a certain amount of the mortgage bonds against said Company are valid obligations of The Jackson Brewing Company, the decision in the courts below having been against the validity thereof.

"4. That the said John B. Bobe, as assignee of the said Jackson Brewing Company for the benefit of its creditors, stands charged on the tax duplicates of Hamilton county, as set forth in the application herein of Tilden R. French, county treasurer. The said John B. Bobe, assignee for the benefit of the creditors, refused to list any property for taxation, and the same was listed by the assessor, and the said taxes so charged have never been paid by the said John B. Bobe, assignee, and no part thereof; the said charges on the said tax duplicates, as returned by the assessor, were made upon the tangible personal property employed in the conduct of said business by the as-

signee, and being the property in his hands as assignee for the benefit of creditors."

By reference to the records of the probate and insolvency courts it appears that, by inventory and appraisal filed March 30, 1894, the assets of the corporation were appraised at \$138,298.09, and that the liabilities amounted to \$134,505.10; that the order of March 7, 1894, authorizing a continuance of the business, directed the assignee to employ labor, purchase materials and supplies necessary to prevent waste, to preserve the property and assets and to manufacture beer in the usual and ordinary way until further orders; that February 9, 1895, the case was transferred to the court of insolvency; that that court, August 30, 1895, upon a written application of the creditors and the assignee, being satisfied that it would be for the advantage of the creditors that the business be continued by the assignee, ordered that said business be continued by him as theretofore until March 6, 1896, and until the further order of the court. Also, that October 23, 1897, the assignee made a report to the court showing, among other things, that the sales of the company for the year preceding the assignment were 14,715 barrels of beer, those of the first year under the assignment were 21,813, of the second year, 26,070, of the third year, 31,500, and the fourth year (estimated), 35,000; that substantial and necessary improvements and repairs of ice machine plant, boilers and engines, and machinery generally, as well as additions, etc., had been made; that he had reduced one mortgage on the plant from \$24,636.20 to \$5,000; had paid from earnings for betterments, repairs and improvements aggregating \$44,455.18; also preferred claims, \$1,446.18, his own services, \$13,300; his attorneys, \$1,500, for salaries and

pay rolls, \$89,678.73; that he had loaned the estate of his own money \$3,000 in 1894, and during succeeding years sums amounting in the aggregate to \$20,500, all of which was necessary for the successful conduct of the business, and all of which he has since repaid to himself; that there remained in merchandise indebtedness of the estate, which was due for current expenses and costs of administration, about \$500; that he had cash on hand in bank \$20,288.26; government stamps \$1,700.87, and 7,272 barrels of beer in the cellar; that there had been large additions to the machinery, horses, wagons and cooperage, all paid for, and a sufficient quantity of supplies and materials, all paid for, to maintain the business in its present demands, and that the plant is in a much better condition than at the date of assignment. Having no need for at least \$15,000 of the cash on hand he desired an order directing its payment on debts, and such order was made. The sales by the assignee have been of the manufactured products. No attempt has been made to sell the brewery plant or the personal property used in the manufacture of beer.

Upon the facts found by the common pleas that court adjudged that the assignee pay the taxes so claimed from moneys in his possession as assignee, and that he list the personal property for taxation during his continuance in the operation of the brewery. This judgment was reversed by the circuit court, and the treasurer brings error.

Gideon C. Wilson; Otway J. Cosgrave and Oliver B. Jones, county solicitors, for plaintiff in error.

The question to be determined in this case is whether tangible personal property in the hands of an assignee for the benefit of creditors, and used by

the assignee in continuing the business operated under the orders of the court of insolvency, is chargeable with taxes, and whether it is the duty of such assignee to list such property so held by him for taxation, and to pay the taxes levied thereon.

The claim of the plaintiff in error is that property held and used by the assignee in operating and running the brewery is subject to taxation in the same manner as other property, and that the assignee should list the same for taxation and pay the taxes thereon while so holding it.

Section 2, article 12, of the constitution provides that: "Laws shall be passed taxing by uniform rule * * * all real and personal property, * * * but burying grounds, public school houses and houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value \$200 for each individual, may, by general laws, be exempted from taxation." Pursuant to this constitutional provision, section 2731, Revised Statutes, provides that: "All property, whether real or personal, in this state, and whether belonging to individuals or corporations, * * * shall be subject to taxation except only such as may be expressly exempted therefrom." Section 2732, and the sections supplemental thereto, specifically provide for all exemptions which have been allowed by the general assembly under the authority of the section of the constitution above quoted. Exemptions from taxation are strictly construed, and must be expressed in clear and unmistakable terms. *Cincinnati College v. State*, 19 Ohio, 110; *Library Assn. v. Pelton*, 36 Ohio St., 253; *Lee v. Sturges*, 46

Ohio St., 153; *Sturges v. Carter*, 114 U. S., 511, 521. All property must bear an equal and just proportion of the burden of taxation. *Toledo Bank v. Toledo*, 1 Ohio St., 622.

Our opponents will hardly claim that any of the property sought to be taxed in this case is exempt from taxation by direct provision. But it will probably be contended, in order to avoid the listing and payment of taxes thereon by the assignee, that the several creditors should each be taxed on his interest in said property. Section 2734, Revised Statutes, provides who shall list personal property, and among other things, that the property "of every person for whose benefit property is held in trust" shall be listed "by the trustees." Sections 2735 and 2736 provide where and when property shall be listed for taxation. Section 2737 provides for a distinct statement of the several classes of personal property under separate numbered paragraphs. The paragraphs named in the statute applicable to the property held by the assignee in this case, are: (1) horses, (3) mules, (7b) wagons, etc., (7f) office furniture, etc., (12) average value of articles purchased, held as a manufacturer, (12a) average value of articles on hand, manufactured, etc., (12b) tools, engines, machinery, etc., (13) moneys. This section also provides, under the 14th item, for listing the amount of credits as defined by section 2730, and provides that no indebtedness can be deducted from any item enumerated in the section except from the 14th item. In the returns that have been made on which it is sought to collect taxes in this proceeding, nothing has been listed under the 14th item, only "the tangible personal property employed in the conduct of the business;" therefore, for the purpose of determining

whether taxes should be paid, it is immaterial whether this estate is insolvent or not. The other side makes the argument that the creditors of this estate should separately list their credits and in that way the entire property would be at once listed for taxation, except a possible surplus which should be listed by the assignor. In answer to this it is sufficient to say that no creditor owns any particular horse, or any certain interest therein, nor any particular piece of machinery, barrel of beer, or any specific part of the tangible property required to be scheduled under section 2737, and, therefore, could not, in the way prescribed by that section, list his beneficial interest or credit. We also call attention to section 2742, which requires every manufacturer to list for taxation certain property in accordance with its terms. Even though Mr. Bobe is an assignee for the benefit of creditors, he is in that capacity, while carrying on his business, a manufacturer, and is by the terms of this section required to list property for taxation. It is contended that because the chapter on insolvent debtors in no place makes it the specific duty of the assignee in trust for creditors, as such, to list or pay the taxes upon the personal property, that it is therefore intended in the law that he should be free from that duty. Section 6355, however, provides that all taxes of every description assessed against the assignor on any personal property held by him before his assignment, shall be paid by the assignee or trustee, out of the proceeds of the property assigned in preference to any other claims against the assignor. It is claimed that because this provision refers only to taxes "assessed against the assignor" that therefore taxes assessed against the assignee after the assignment are not contemplated; but it seems to us under the general pro-

visions of the chapter on taxation that it would more readily appear that the duty of listing and paying the taxes assessed against himself would go as matter of course against the assignee, especially as section 6357 expressly authorizes the allowance by the court of all actual and necessary expenses of the assignment. Surely taxes which in all other business enterprises are such might in assignments be considered an actual and necessary expense.

Our opponents rely upon the case of *McNeill v. Hagerty*, 51 Ohio St., 255. The cases are not analogous. In the *McNeill* case the securities were not held by the assignee as an investment for the sake of interest, but were in that form for temporary purposes only, being held subject to the order of the probate court, and might be required to be converted into money and that money distributed at any time. Here, in the case at bar, the entire investment in the hands of the assignee is being used for the purpose of making money, and under the skillful management of those having the estate in charge it has not only made money, but has added to the manufacturing plant and increased its value, and it will not do to say that the respective equitable interests of the creditors should be separately returned by each of them as a credit and in that way the property would be listed for taxation, because even if it were in practice possible or practicable for each creditor to list the value of his claim, there would then be a large residuum belonging to the assignor company which would go free from taxation, unless it were either returned by such assignor or by the assignee. Taxes paid would be a proper expense. See generally *Ex. Bank v. Hines*, 3 Ohio St., 1; *Rheinboldt v. Raine*, 52 Ohio St., 160, and *Lec v. Sturges*, 46 Ohio St., 153.

French, Treasurer, v. Bobe, Assignee.

The decisions in other states hold such property liable for taxes. The weight of authority is to the effect that property in the hands of a trustee, whether a receiver or assignee, or any other of the numerous classes of trustees, is liable for taxation. *State Clark Pros. v. Grover, Collector*, 37 N. J. L., 174; *Schmidt, Treas., v. Failey, Receiver*, 148 Ind., 150; *N. J. & C. R. R. Co. v. Comrs.*, 41 N. J. L., 235; *George v. St. Louis, etc., Ry. Co.*, 44 Fed., 117; *Ex parte Chamberlain*, 55 Fed., 704; *Central Trust Co. v. Railway Co.*, 26 Fed., 11; *Dunlap v. Gallatin County*, 15 Ill., 7; *Jack v. Wiennett*, 115 Ill., 105; *Spalding M. C. v. Commonwealth*, 88 Ky., 135; *People v. Lardner, Treas.*, 30 Cal., 243; *Stevens v. N. Y. & O. M. R. R. R. Co.*, 13 Blatch., 104.

Kramer & Kramer, and *Lawrence Maxwell*, for defendant in error.

Brief of *Kramer & Kramer*.

The statute regulating the mode of administering assignments in Ohio contemplate and provide for two general methods of settlement. The one has reference to the property of the assignor, not engaged at the time of the assignment in a manufacturing business; the other to the property and business of a manufacturing concern, the continuation of which for a time within the discretion of the court, is essential to the preservation of the property and its ultimate sale. The one method is provided by section 6350 and the other by section 6350h. The business of the assignor in this case being that of manufacturing and selling beer, the court under the latter section ordered the business to be continued by the assignee until the further order of the court. The same section provides that the court may order the discontinuance of the

business, when deemed advisable, so that the order to continue and to discontinue, are confided exclusively to the sound discretion of the court of insolvency. This wise provision of the statute is peculiarly adapted to the exigencies of a case of this character. Here was the brewery with a certain amount of unfinished material on hand, with beer in the process of manufacture, possessed of machinery out of repair which required improving for the finishing of the material. The claim made by the treasurer practically amounts to this: that the assignee who, under the order of the court, administers the property pursuant to section 6350h of the statute is required to list and pay taxes upon the personal property assigned to him. While on the other hand, property administered by the assignee under section 6350 of the same general statute, is not so required. No such distinction is made by the statute and none can be implied. Nowhere in the entire act regulating the mode of administering assignments for creditors can there be found any obligation resting upon the assignee in relation to the payment of taxes upon personal property held by him in trust for the benefit of creditors except under section 6355. That section provides that "All taxes of every description assessed against the assignor upon any personal property held by him before his assignment, shall be paid by the assignee or trustee out of the proceeds of the property assigned, in preference to any other claims against the assignor." This sole provision, therefore, negatives the idea that any other taxes are chargeable against the property held by the assignee under any section of the statute. It would seem that if any intention of the legislature existed to make such property chargeable in the hands of an assignee for taxes, after the assign-

ment is made, the section which provides for the payment of taxes assessed against the assignor would also have provided for the listing and payment of taxes upon such property after the same came into the hands of the assignee. If not under that section, under some other; either under the general statutes relating to taxation, or under the act relating to assignments for the benefit of creditors. The method employed in continuing the business of the assignor, by manufacturing its product, maintaining its goodwill, and preserving its machinery, looking to, as contemplated by the statute, the final sale for the benefit of the creditors, instead of at once selling out at unnecessarily sacrificing prices, can make no difference in the principle governing the question of taxes. If an assignee for the benefit of creditors is not required by law to list the property in his hands while administering it, the fact that the assignee is using it in carrying on the business, it seems to us, cannot create any new liability for taxes which did not exist before.

We have supposed that the law had been settled in this state by this court. In *McNeill v. Hagerty*, 51 Ohio St., 255, this court held: "Personal property, whether in the form of moneys, bills receivable, bonds, certificates of stock, or otherwise, held by an assignee of an insolvent debtor whose estate is being settled in the probate court, is not subject to taxation, and it is not the duty of such assignee to make return of the assets of such estate to the county auditor for taxation." It is urged, however, that the assignee was there strictly following the statute, which, it is claimed, provides for the entire winding up of the assigned estate. The record in this cause shows that the assignee was also strictly following the statute with the object of winding up the estate. Can the

time within which the estate is settled make any difference touching the question of taxation? Time is not the essence of the obligation. It is said that because the property is not at once converted into money and distributed it is subject to taxation. The section of the statute which authorizes the continuance of the business has in view the ultimate sale of all the property, and its conversion into money at such time as the court orders the discontinuance. The time within which the sale is to be had is within the sole discretion of the court. The assignee is but the officer of the court in the administration of the assignment whether it be in the immediate or ultimate sale of the property. This court has already held that the only section of the statute under which any pretense of claim might be made, namely, section 2734, does not apply to an assignee of an insolvent who administers the same under the orders of the court. The power of taxation, it is true, is inherent in the government. It is, however, strictly a legislative power. "The courts cannot control its exercise unless such exercise conflicts with the constitutional limitations." *Wheeling Trans. Co. v. Wheeling*, 99 U. S., 273; *Porter v. Rockport*, 76 Ill., 561; *Board of Education v. McLandsborough*, 36 Ohio St., 227, 232.

Unless, therefore, the case under consideration, can be distinguished from that of *McNeill v. Hagerty*, *supra*, it would seem useless to consider any other question. We maintain that it cannot be. It is urged that receivers of corporations are required to list for taxation. While that is true, it is so by virtue of the statute. There can be no analogy between the relation of an assignee of an insolvent company to that of a receiver, within the meaning of the tax laws. The possession and control of the property of a com-

pany by a receiver is within the ultimate object of returning the property to the corporation itself. The possession and administration of the property of an insolvent by an assignee is for its ultimate sale and distribution of proceeds to the creditors, not to the corporation itself. In the administration by an assignee the proceedings are had under a statute which provides "that all the property shall be devoted absolutely to the payment of the debts of the corporation." The duty of the assignee to convert assigned property into money is not affected by the authority under section 6350h, to continue the business; the business is not to be continued, under the insolvent laws, with a view of turning the property back, but to sell it in the discretion of the court so that it may be wound up and in its place shall be realized money to be distributed ratably to the creditors. A receiver is appointed by a court of equity, which has the power, even upon objection of creditors, to return the property to the corporation when the purpose for which the receiver is appointed is accomplished. No power exists on the part of the court, however, to return the property to the assignor without the consent of each and every creditor, however large or small his claim may be. Equitably the title is vested in them; no title whatever is vested in creditors of a corporation for which a receiver is appointed.

The argument also made is that section 6357 authorized the allowance by the court of all actual and necessary expenses of the assignment, that the payment of taxes would be an actual and necessary expense. No construction, however, of that kind has been placed by this court upon that section of the statute in considering the case of *McNeill v. Hagerty*, *supra*. If such construction should be given it

would be equally applicable in cases where the court did not order a continuation of the business with the property until ready for sale. It could not be considered as an expense unless it was legally allowable as such.

We claim that there is not even a distinction between this case and the other on the facts so far as the subject matter against which taxes are claimed to be chargeable is concerned. After all, the question involved here is the same as was involved in the other case. As the taxes charged are against the *res*, the property, not for the right to carry on the business, we can see no distinction even in the facts between the two cases. Hence there can be no distinction in the law. If this property is subject to taxation it would result in double taxation, equally so as to property involved in the case cited. The courts will always avoid a construction of the statute which results in double taxation unless the legislative intent be clear. *Cooley on Tax.*, 225.

If the judgment of the common pleas, which the petition in error in this court seeks to affirm, is restored, the effect would be to defeat the control and administration of the estate in the court of insolvency. Thus the very object of the statute authorizing that court to order the property to be employed in running the business, would be defeated. The original and exclusive jurisdiction in the court of insolvency in determining how long the business should continue and when it should terminate will be interfered with and taken from the control of the court itself. The jurisdiction of that court in the administration and settlement of insolvency estates is original and exclusive. *Lindeman v. Ingham*, 36 Ohio St., 114; *Saylor v. Simpson*, 45 Ohio St., 141; *Clapp v. Bank-*

ing Co., 50 Ohio St., 528. The principle of law for which we contend, applicable to the case under consideration, is sustained by the authorities. *Lancaster School Directors v. Rathbone*, 30 P. St., 533; *Brooks v. Hartford*, 61 Conn., 112; *State v. Irons, Collector*, 35 N. J., 464; *State v. Staats*, 39 N. J., 653.

SPEAR, J. The question arising upon the record is this: Is the personal property in the possession of an assignee for the benefit of creditors of a manufacturing corporation, which estate is not being reduced to money for distribution among the creditors of the corporation, but is being held and operated under the orders of the insolvency court at the joint request of the creditors and the assignee, as a going business, such business being conducted as it had been theretofore by the corporation itself, subject to taxation, and is it the duty of the assignee to list such property for taxation?

From a consideration of section 2 of article 12 of the constitution, respecting taxation, and of sections 2731, 2732 and 2734, Revised Statutes, relating to the same subjects it is manifest that property thus in possession of the assignee is subject to taxation, and that it is his duty to list it for taxation, unless the same is exempt by direct provisions of law or by fair inference from all the legislation bearing on the subject. It was the opinion of the insolvency court and of the circuit court, and is urged in argument by counsel for defendant in error, that it should be held to be exempt, and that the case is ruled in favor of the assignee by the case of *McNeill, Assignee, v. Hagerty, Auditor*, 51 Ohio St., 255. We are of opinion that the property is not exempt and that the case at bar is so clearly distinguishable from the case cited, that its

decision is not controlled by that case. That action was an application for an injunction to prevent the auditor from enforcing against the assignee a claim for taxes based upon a return made by the assignee under threat to take legal steps against him for failing to make return, and looking to an attempt at distraint in case the taxes were not paid. It appeared that the entire assets in the hands of the assignee were collectible notes for property sold by him and cash on hand, amounting in all to \$25,910.90; that the debts of the assignor aggregated \$65,000; that there could be paid creditors a dividend of between thirty and thirty-five per cent. only, and that the assets awaited an order of distribution to creditors. The assignee's claim was that the assets were in his hands as an officer of the probate court, subject to an order of distribution so soon as the same could be made, and that the beneficial interest in the property thus held was in the creditors, and that to the extent of the value of the claims of the creditors against the assignor such claims were, under the law, required to be returned for taxation by the creditors, and not by the assignee, and hence an injunction should be allowed against the auditor. This claim was sustained by the trial court and by this court. That the condition in the present case is an essentially different one, recurrence to the facts heretofore recited will abundantly show. There the indebtedness largely exceeded the value of the assets, and the assignee was proceeding strictly under section 6346, Revised Statutes, and following, to reduce the assigned property to money and close out the estate by a distribution of the proceeds among the creditors. He had sold all the property and held only its avails; he was neither holding the property of

the assignor, or any of it, nor operating the business. Here the appraised value of the property exceeds the indebtedness. The assignee is not selling, and has not attempted to sell, any of the assigned property, but is proceeding under section 6350h, to operate the plant. That section gives authority to the court, upon the written application of three-fourths in number and amount of the creditors and upon being satisfied that it will be for the advantage of the creditors, to order the assignee to continue to carry on the business of the assignor, and, with the approval of all concerned, he has been, under the court's order, thus conducting a beer manufacturing plant for six years and over. It has been a sort of partnership affair. The corporation having ceased to do business because insolvent, and the property thus being held in trust for the benefit of creditors, they—the *cestuis que trustent*—have, in effect, invested the property in a scheme to continue the business, and the assignee has advanced his own personal funds in the venture. Large and valuable additions have been made to the plant, its productive capacity greatly increased, its volume of yearly business more than doubled, much of the original indebtedness discharged, and the business transformed from a losing affair to a prosperous one, with a fair promise of finally discharging all debts and leaving to the corporation a surplus. Thus the business has been conducted like any other business of similar character and has proved a source of profit apparently to all concerned, and yet has yielded to the state no taxes during all these years. A controlling distinction between the case cited and the present case at bar is that in the former the assigned property had been sold and the estate was, in substance as well as form, being settled in the probate

court, while in this case the assigned property is being held and operated in the management of a manufacturing business, and the estate is thus being continued as before, but is not being settled. Hence, the rule of law applied to the McNeill case has not application to the present case.

In substance, and in all essential particulars, the position of the assignee in this case is much like that of a receiver. He is clothed with the legal title to the property of which he has possession (which cannot be said as to a receiver), but in no other particular is there any real difference. He has held, and is holding, the property, not for the purpose of sale and distribution, but for the purpose of operating the same for profit. Indeed the very order which directs him to operate in effect forbids him to sell. It may be conceded that in form, and from the strict legal standpoint, the estate is in the court of insolvency for settlement, but in reality it is not being settled, but, on the other hand, the arrangement amounts to an investment of the creditors' money in the management of a going concern. There is no present effort nor purpose to sell, but simply a purpose to hold and operate. As a receiver, if directed by the court, manages the property in the interest of creditors, so this assignee manages under the order of the court for the benefit of creditors; and as a receiver, where all debts and expenses have been paid, may be ordered by the court to turn over the remaining property to the original debtor, so may the assignee in case all of the debts of this corporation, including the expenses of the trust, are satisfied, be required to reconvey the remaining property to the assignor. Each is equally an officer of the court and bound to carry out its behests. As a general rule it may be stated that there

is no sound principle upon which the property of a person or corporation in the hands of a receiver to be managed for the interests of those concerned, can be regarded as exempt from the burden of taxation; and this principle is distinctly recognized in our statute, by the requirement of section 2734, defining by whom property shall be listed for taxation: "Of corporations whose assets are in the hands of receivers, by such receivers." In spirit this requirement applies to the case at bar.

Our conclusion is that the property in the hands of the defendant in error, as assignee, is subject to taxation, and that it is the duty of such assignee to list it for that purpose.

The judgment of the circuit court will be reversed and that of the common pleas affirmed.

Reversed.

MINSHALL, C. J., and WILLIAMS, BURKET, DAVIS, and SHAUCK, JJ., concur.

SWISHER v. MCWHINNEY ET AL.

Guardian gave general and special bonds—Sections 6259 and 6285, Rev. Stat.—He also gave realty mortgage to indemnify sureties on both bonds—Dies insolvent and defaulter—Sureties on general bond insolvent—On special bond solvent—Proceeds of mortgage security to be credited on both bonds in proportion of liability of several sureties to amount realized from sale—Rule of calculation of interest upon amount realized by guardian in sale of realty—Distributive share to wards from realty sale—Pleadings—Two or more actions pending—Parties agree that law as held in one case shall control in all—Except as to matters of fact—Does not preclude either party, after one case tried, to raise other issues of fact.

1. Where there are two or more actions pending, and pleadings are made up as to certain issues, and the parties stipulate that the law as finally held in the one case tried, shall control in the other cases, and be conclusive as to all matters in the cases not yet tried, "except as to matters of fact upon which issue may be joined therein," such stipulation does not preclude either party, after the one case has been finally disposed of, from raising other issues of fact by proper pleadings, on leave of the court.
2. A guardian upon his appointment gave a general bond with three sureties under section 6259, Revised Statutes, and afterward gave a special bond with two sureties for the sale of real estate under section 6285, and later died insolvent and a defaulter to his wards in a large sum received on the sale of real estate and from other sources, having commingled the funds and used them as his own; before his death he gave a mortgage on his real estate to his sureties on both bonds for their indemnity; after his death his administrator sold the real estate upon petition in the probate court to pay debts, and by order of that court paid the net proceeds to the wards, and they applied the whole of it upon the liability of the general bond, the sureties on that bond being insolvent, and the sureties on the special bond being good. In an action by each ward upon the special bond for his share thereof, the bond being largely in excess of the amount received on the sale of the real estate, the courts below held that the sureties on both bonds were co-sureties

for the amount of the guardian's default, and that each surety was entitled to have one-fifth of the amount realized under the mortgage, applied as a credit on his liability on the bond signed by him, and that sum being greater than the liability of the two sureties on the special bond, rendered judgment in favor of the two sureties and dismissed the petition—held: that this was error; that the sureties on both bonds were co-sureties only to the extent of the proceeds of the sale of the real estate; that the two sureties on the special bond were entitled to have the sum realized from the indemnity mortgage, credited upon their liability in proportion of the liability under the special bond for funds received on sale of real estate to the liability under the general bond for funds not so received.

3. Interest should be calculated upon the amount realized by the guardian on the sale of the real estate with annual rests to the date of his death, and thereafter at simple interest without such rests to the rendition of the judgment.
4. Where the wards own the real estate in equal shares, the money realized from the special bond given on the sale of such real estate, should be equally divided among them, even though the amount due to the several wards by reason of other funds received by the guardian, may be unequal.

(Decided March 26, 1901.)

ERROR to the Circuit Court of Darke county.

On February 14, 1884, one J. N. Lowry was appointed guardian, by the probate court of Darke county, of Viola Swisher, Olive Swisher and Warren C. Swisher, minor children of Robert Swisher, deceased, and gave a guardian's bond under section 6259, Revised Statutes, in the sum of twelve thousand dollars, with D. T. Shepherd, N. M. Wilson and Jacob Warner, as his sureties.

Afterward the guardian filed a petition in the probate court to sell the lands of his wards, and in that proceeding he was required to give a bond under section 6285, Revised Statutes, to secure the proceeds of such sale, and he gave such bond on the 16th day of

Swisher v. McWhinney et al.

February, 1885, with said Frank McWhinney and Daniel Ryan, defendants in error, as his sureties, which bond was in the sum of twenty-three hundred dollars, was in due form, and was conditioned as follows:

"That if the said J. N. Lowry as guardian of said wards as aforesaid shall well and faithfully discharge his duties as such guardian and well and faithfully pay over to the proper person or persons, and account for all the money arising from the sale of said real estate, according to law, then these presents to be void, otherwise to be and remain in full force and virtue in law."

The lands were duly sold in said proceeding, and the net proceeds amounted to the sum of \$876.75, one-third part of which belonged to each ward.

The guardian received large sums of money for his wards from other sources, but kept no separate account between the money received from the sale of the land, and the money received from other sources, but commingled all the funds together indiscriminately, and used them as his own, and died insolvent on the 9th day of November, 1891. The last settlement filed by him was in May, 1890, and he then owed his wards \$7,179.56.

After his death, his administrator filed accounts of said guardianship, and the probate court found from said accounting, that there was due to said wards from their said guardian at the time of his death, the following sums: Viola Swisher, \$2,252.35; Olive Swisher, \$2,061.71, and Warren C. Swisher, \$2,607.73; total \$6,921.79.

Said wards having become of the age of majority, demanded of said defendants in error the payment of the full amount of the bond so signed by them for

\$2,300.00, and upon refusal each one began a separate action against said defendants in error on said bond for the apportionate share of each in the same, with interest thereon from the ninth day of November, 1891, being the date of the death of their said guardian.

An answer was filed by said Frank McWhinney and Daniel Ryan to the petition of Olive Swisher, in which they claimed that they could be held in any event for only the amount for which the land sold, \$876.75, and that as the guardian's accounts showed that he had paid out more than that sum for the wards, they were entitled to have sufficient of his payments credited on their liability on the bond to discharge the same in full. The courts held that they were not entitled to such credit, but that their liability did not extend beyond the amount for which the land sold with interest.

Olive recovered her one-third of the proceeds of the sale of the land, \$292.25, with interest from the date of the death of her guardian. That case came to this court and is reported in (*McWhinney v. Swisher*) 58 Ohio St., 378.

Instead of filing answers to the petitions of Viola and Warren C., counsel caused to be entered upon the journal in each case the following:

"By agreement of the parties to the above entitled action, the final disposition of the several motions and demurrers filed in said case, or hereafter filed to any of the pleadings in said case, are to be controlled by the final holding and disposition of the courts upon similar motions and demurrers in the case of *Olive Swisher v. Frank McWhinney et al.*, now pending as Case No. 15,047 in the court of common pleas of Darke county, Ohio.

"In other words, the law as finally held in that case in the court in which said case is finally submitted, is to control in the above entitled case, and to be conclusive as to all matters in said above entitled case, except as to matters of fact upon which issue may be joined therein."

After the judgment in favor of Olive had been affirmed by this court, and the mandate sent to the clerk of the court of common pleas, counsel for Viola, and Warren C., moved for a like judgment in their cases. This was resisted by counsel for the sureties, and they asked leave to file answers, which was granted by the court. Thereupon they answered in substance that after the guardian found that he could not pay the money owing to his wards, and for the purpose of indemnifying his sureties on said two bonds, one for \$12,000.00, and the other for \$2,300.00, he made and delivered to his said sureties, on the 18th day of July, 1891, a mortgage on his real estate, which was duly accepted and recorded, and was conditioned as follows:

"Provided, nevertheless, that whereas said Frank McWhinney and Daniel Ryan on the 16th day of February, 1885, became sureties for said J. N. Lowry, on a certain guardian's bond, as guardian of Olive, Viola and Warren C. Swisher, minors, in the sum of \$2,300.00, which bond was on said 16th day of February, 1885, approved and accepted by said probate court and recorded in volume 1, guardian's bond record, page 62 of probate record.

"And, whereas, said D. T. Shepherd, Jacob Warner and N. M. Wilson, on the 31st day of January, 1884, became sureties for said J. N. Lowry, on a certain guardian's bond as guardian of Olive, Viola and Warren C. Swisher, minors, in the sum of \$12,000, which

bond was on said 13th day of February, 1884, approved and accepted by said probate court, and recorded in Volume 'F,' page 434, guardian's bond record, in probate record.

"Now, if said J. N. Lowry, his heirs and assigns, shall well and truly pay his said wards, as they become of age, or to his successors, the amounts found due said wards, and shall well and truly account for all moneys, credits, etc., received by him or hereafter to be received, and fully perform the conditions of said bonds and save these mortgagees harmless, then these presents shall be void. Otherwise, to be and remain in full force and virtue."

That the administrator of the deceased guardian filed a petition in the probate court to sell said land to pay debts, and made the sureties on said two bonds defendants; that said administrator sold said land for the net sum of \$3,820.00, and the probate court ordered him to pay that sum upon the amounts found due said wards, and that he did so pay the same as follows: to Viola \$1,232.25; to Olive \$1,098.25, and to Warren C. \$1,489.50. That said payments were applied to the liability of the sureties on the bond for \$12,000.00, they being totally insolvent, and no part was applied to the liability of the sureties on the bond for \$2,300.00; that the defendants in error had no knowledge of such application, and did not consent thereto, and averred that they were entitled to have an equitable share of the \$3,820.00 applied to the discharge of their liability on the bond signed by them, and that when so applied it would discharge their entire liability on the bond.

There was a reply filed setting up the agreement as to abiding the result of Olive's case, and also other matters, but as it conceded the controlling facts in

the answer, a demurrer was sustained thereto, and exceptions taken. Thereupon, judgment was rendered in favor of the bondsmen upon the petition and answer, and exceptions again noted. The circuit court affirmed the judgment. Thereupon the plaintiffs below, Viola and Warren C., filed their petitions in error in this court, and the two cases were heard together.

Meeker & Gaskill and *Allread & Teegarden*, for plaintiff in error.

R. S. Frizell and *Anderson & Bowman*, for defendant in error.

BURKET, J. In *McWhinney and Ryan v. Swisher*, 58 Ohio St., 378, this court held that, "The liability of the sureties of a guardian upon his additional bond given pursuant to section 6285, Revised Statutes, to account for the proceeds of the sale of real estate of his ward, can not be extended beyond the terms of their undertaking, although the guardian commingles such proceeds with money of his ward derived from other sources for which he fails to account."

This court also held in that case that "Although the proceeds of the real estate are exceeded by general payments made by the guardian from such commingled fund, his sureties are liable in an action by the ward after majority, for all such proceeds, they being within the amount of the general balance found in the hands of the guardian."

The matters so determined in *Olive Swisher's* case were not attempted to be again litigated in the answers to the petitions of *Viola Swisher* and *Warren C. Swisher*, but were conceded to be settled by that case.

The matter as to the proper division and credit of the fund of \$3,820.00 realized on the mortgage taken by the sureties on the two bonds, was not brought into the case of Olive Swisher and was not covered by the agreement, but was within the exception, "as to matters of fact upon which issue may be joined therein." There was therefore no error in sustaining the demurrer to that part of the reply. And there was no error in sustaining the demurrer to the whole reply, because it did not controvert the controlling facts of the answer.

The most difficult question is, as to the rights of the wards and the sureties on the bonds, as to the \$3,820.00 realized on the sale of the land covered by the indemnifying mortgage to both sets of sureties. As the three sureties on the general bond taken when the guardian was appointed are insolvent, the wards claim that they have the right to apply the \$3,820.00 on the liability of those three sureties, and it was so applied, leaving the sureties on the bond given on the sale of the land by the guardian, without any benefit from the \$3,820.00.

It is well settled that when a creditor receives money from his debtor without any direction as to which debt the money shall be applied upon, the creditor may make the application to his best advantage. *Gaston v. Barney*, 11 Ohio St., 506. *Tuttle v. Northrop*, 44 Ohio St., 183.

But the rule applies only when all the debts are owed by the debtor paying the money, and can not apply where the money comes from two persons, and both owe one debt, and one owes another debt. In such case the creditor can not apply the whole fund to the payment of the debt owed by the one, because that would be applying the money of two persons to

pay the debt of one of them. In short, it would be applying the money of one person to pay the debt of another. In such cases the money must be applied upon the debt owed by both. But if the money is not owned by the persons paying the same in their own right, but was obtained for the purpose of indemnifying themselves as sureties, on different debts or liabilities, as in the case at bar, the creditor need not apply the fund to the payment in full of the debt owed by both, but may apportion the fund between the two debts in proportion to the amount of each, especially may this be done when one of the debtors is insolvent. But the creditor can not in such case apply the whole fund to the debt owed by the insolvent debtor, and thereby deprive the solvent one from receiving any benefit from the fund which he was instrumental in securing for the purpose of saving himself from loss on the debt owed by both.

In the case at bar the three wards had no right to apply the whole fund of \$3,820.00, realized from the mortgage taken by the two sets of sureties for their indemnity, upon the liability of the three sureties on the general bond, and thereby deprive the two sureties on the special bond from realizing any benefit from the said fund which they were instrumental in securing to indemnify themselves. The most that the wards could do was to divide and apportion the fund between the sureties of the two bonds in proportion to the liability of the sureties to the wards on each bond, and give each set of sureties credit accordingly.

The total liability of the guardian at his death on November 9, 1891, was \$6,921.79. The liability for the proceeds of the land sold for \$876.75 net, was on the same date, counting interest with annual rests, \$1,297.37. Therefore the two sureties on the special

bond were then liable to the wards for this sum of \$1,297.37, and the three sureties on the general bond were also liable to the wards for that sum, and as to that sum the sureties on both bonds were co-sureties, because they were sureties to secure the payment of the same debt, liability, or obligation. But as to the balance of the liability of the guardian to the wards \$5,624.42, the three sureties on the general bond alone were liable, and the two sureties on the special bond were not liable therefor; and as to that sum they were not co-sureties with the three sureties on the general bond.

The sureties on both bonds, by their efforts, obtained the mortgage from the guardian from which the fund of \$3,820.00 was realized, for their indemnity, and but for their efforts that fund would also have been lost to the wards. That fund can therefore not be treated as a mere payment made by the guardian, thus reducing his liability to \$3,101.79, and leaving the sureties on the two bonds liable as if that had been the whole of the amount for which the guardian defaulted. True the \$3,820.00 was realized out of the property of the guardian, but it was not paid by him to the wards, but was wrung from him by the sureties for their own indemnity, and they are entitled to be rewarded for their diligence by having it so credited as to benefit both sets of sureties, in proportion to the liability of the sureties on each bond, considering the full sum of \$6,921.79 as the amount of the defalcation. When the fund of \$3,820.00 is so divided and credited, there should be credited upon the liability of the special bond, the sum of \$716.00, which taken from the whole liability of that bond \$1,297.37, will leave the sum of \$581.37, due to the three wards from the two sureties on the special bond, at the death of the guard-

ian. As the death of the guardian terminated the guardianship, that sum became a debt at that date due from the two sureties, and would bear simple interest without annual rests until paid, and to this date would amount to the sum of \$908.70.

As the amount is less than the amount due on the proceeds of the sale of the real estate, and as each ward owned one-third of the real estate, it follows that this sum must be equally divided among the three wards, \$302.90 to each. Olive has already been paid in her case, but a judgment will be entered upon the conceded and controlling facts, in favor of Viola Swisher for \$302.90, and costs, and a like judgment in favor of Warren C. Swisher in his case. The court of common pleas erred in rendering judgment upon the petition and answer in favor of the defendants in error, and the circuit court erred in affirming the judgment. Both judgments will therefore be reversed, and judgment rendered as above indicated.

Judgment reversed, and judgment for plaintiff in error.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and SHAUCK, JJ., concurred.

STICKEN v. SCHMIDT.

Wife and husband execute written instrument to lender—Insurance policy on life of husband payable to wife—At death of husband wife received and invested amount in house—Payee of note seeks remedy in wife's home property—But at time of execution of note wife's liability only on separate estate—Property subsequently acquired not liable—Contingent interest of wife in policy not chargeable with payment of note.

In 1876, a married woman, with her husband, executed a written instrument acknowledging the loan of a sum of money to them which they promised to repay to the lender, at any time, with interest. Prior thereto a policy of insurance on the life of the husband had been obtained on the joint application of himself and wife, which, upon performance of the usual conditions contained in such policies, was payable on proper proof of loss, to the wife, or in the event of her death prior to that of the husband, to his children share and share alike, or in the event of no children, to his legal representatives. He paid the premiums until within a year of his death, and those which accrued during that year were paid by her from her personal earnings. He died in 1880, when the insurance was paid to her, and she invested the money in a home. She was at no time the owner of any other property. Several years afterward the holder of the written instrument brought suit against her thereon, in which a personal judgment was the only relief prayed for, though the petition alleged that she was the owner of separate property which she intended to, and did, charge with the payment of the obligation. Held:

1. That the instrument, under the law in force when it was executed, created no legal liability on which a personal judgment could be rendered against the defendant. The extent of her contractual capacity was to charge any separate estate which she might have, and the remedy was to pursue such property, in equity.
2. The ownership of separate property when the contract was entered into, was essential to the establishment of an intention to create a charge thereon. Property thereafter acquired

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did not become bound for the previous engagement, nor did such after acquisition give validity to the promise made when the defendant was not the owner of separate property.

3. The contingent interest of the defendant in the insurance policy on the life of her husband, at the time the instrument was executed, did not constitute her separate property, chargeable in equity with the payment of that instrument; nor did the money thereafter collected on the policy, by relation, become so chargeable.

(Decided March 26, 1901.)

ERROR to the Superior Court of Cincinnati.

The original action was brought in the superior court, by Louisa Schmidt against Louisa Sticken, to recover a judgment on a money obligation executed by the defendant and her husband, and to charge with its payment, the proceeds of a policy of insurance on the life of her husband, which, it is claimed, was her separate property. Judgment was recovered by the plaintiff, from the affirmance of which in general term, error is prosecuted here. A statement of the facts necessary to an understanding of the question presented, is contained in the opinion.

Galvin & Bauer and Robertson & Buckwalter, for plaintiff in error, cited the following authorities:

Ankeney v. Hannon, 147 U. S., 118; *Fallis v. Keys*, 35 Ohio St., 265; *Whitney v. Ott*, 1 W. L. B., 335, 7 Dec. (Re.), 231; *Newark v. Funk*, 15 Ohio St., 462; *Alarm Co. v. Heisley*, 4 Circ. Dec., 691, 7 C. C. R., 483; *Ryan v. Rothweiler*, 50 Ohio St., 595; 3 Sayler's Statutes, p. 2445; *McClelland v. Bishop*, 42 Ohio St., 113.

F. H. Oehlmann and S. T. Crawford, for defendant in error, cited the following authorities:

Ham v. Kunzi, 56 Ohio St., 531; *Yocum, Admr., v. Allen*, 58 Ohio St., 280; *Levi v. Earl*, 30 Ohio St., 147;

Rice v. Railroad Co., 32 Ohio St., 380; *Williams v. Urmston*, 35 Ohio St., 296; *Phillips v. Graves*, 20 Ohio St., 371; *Jenz v. Gugel*, 26 Ohio St., 527; *Avery v. Vansickle*, 35 Ohio St., 270; *Piatt v. Sinton*, 37 Ohio St., 353; *Niles v. Gray*, 12 Ohio St., 320; *Taylor v. Foster*, 17 Ohio St., 166; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St., 156; *Weber et al. v. Paxton*, 48 Ohio St., 266; *Cross v. Armstrong*, 44 Ohio St., 613.

WILLIAMS, J. On the 14th day of March, 1876, F. H. Kock, and Louisa, his wife, executed and delivered, at Cincinnati, Ohio, to Louisa and Heinrich Schmidt, then also husband and wife, a written instrument acknowledging the loan of four hundred dollars to the makers, which they promised to repay to the Schmidts at any time, with eight per cent. interest.

On the 16th day of December, 1872, on the joint application of F. H. Kock and his wife Louisa, a policy of insurance was issued by the Home Insurance Company of Brooklyn, on the life of the husband, in the sum of three thousand dollars, payable upon the usual conditions contained in such policies, within sixty days after satisfactory proof of loss, to said Louisa Kock, or in the event of her death prior to that of the assured, to his surviving children share and share alike, or in the event of no children surviving, then to the legal representatives of the insured.

It appears that the premiums on the policy, which amounted of \$23.01, quarterly, payable in December, March, June and September of each year, subject to reduction by participation in certain expected profits, were paid by the husband regularly up to within a year of his death, and those accruing in that year

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were paid by the wife out of her own earnings. The premiums paid when the instrument hereinbefore mentioned was executed by Kock and his wife, amounted, in the aggregate, after deduction of profits, to about three hundred dollars; and the policy contained a provision that on its surrender after the full amount of two or more annual premiums were paid, the company would issue a paid up policy for the amount of the premiums paid, less the amount retained as dividends. No surrender was made, nor paid up policy issued; and, in January, 1880, her husband having died, Louisa Kock received the full amount of the insurance money. She was afterward married to a Mr. Sticken, whom she survives, and the action below was brought against her by that name. The petition alleges that Heinrich Schmidt died in 1894, and the plaintiff became and is the sole owner of the obligation sued on; and that, when it was executed the defendant was the owner of a separate estate which she intended to, and did charge with the payment of the debt so contracted. Issue was taken on these allegations, and the question in the case is, whether the defendant's interest in the insurance policy or its proceeds, constituted, when the instrument in suit was executed, her separate property which she thereby could, and did, charge with the payment of that obligation; it not being claimed that she possessed any other property.

Since the execution of the instrument the powers of married women to enter into contracts, and the remedies thereon against them, have been materially enlarged. Under the law then in force, with a few exceptions not important here, they were incapacitated by coverture to create a personal legal liability by contract, or bind their general estate. The extent of

their contractual capacity was to charge their separate estate, in equity, for their obligations; and the remedy was to pursue and subject such property to their satisfaction; personal judgment on which execution could issue was not authorized. 63 O. L., 47.

Phillips v. Graves, 20 Ohio St., 371; *Williams v. Urmston*, 35 Ohio St., 296; *Avery v. Vansickle, Ib.*, 270.

The personal property which then constituted a separate estate that the married woman could charge with her debts, consisted of such property of that kind as belonged to her at her marriage, or came to her during coverture by gift, bequest, or inheritance, or by purchase with her separate means, or became due as wages of her separate labor, or grew out of a violation of her personal rights. 68 O. L., 48.

To give rise to an intention to charge her separate estate by her contract, and create such a charge upon it, it was essential that such property should belong to her at the time the contract was entered into. And it was the settled law that her engagement entered into when she had no separate property would not bind property thereafter acquired, nor would such after acquisition give validity to a previous engagement entered into when she was not the owner of a separate property. *Avery v. Vansickle, supra*; *Jenz v. Gugel*, 26 Ohio St., 527; *Fallis v. Keys*, 35 Ohio St., 265, 266. Little, if any aid, in arriving at the nature of the defendant's interest in the policy in question, is afforded by the statute in force when it was issued, relating to insurance by the wife on the life of her husband. That statute provided that a married woman might, in her own name, cause her husband's life to be insured for her sole use; and in case she survived, the insurance should be paid to her, for her sole

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use, free from any claims of his representatives or creditors. 69 O. L., 159. It did not contain the provision now found in section 3629, of the Revised Statutes, that, if the policy, by its terms, is payable to a married woman solely for her use, she may sell, assign or surrender the same, the husband uniting therein. Even if the latter provision had been in force when the policy was issued to the defendant, it is not apparent how her interest in it would be enlarged or affected thereby, or how such a result follows from the former provision which was then in force. Both provisions, it will be noticed, are applicable only to policies in which the wife is the sole beneficiary named, and which are issued for her sole use. The defendant's policy was not of that nature, and not within the purview of the statute. By its terms the children and personal representatives of the insured were made beneficiaries, and had an interest of the same general nature as that of the defendant, though more remote. The interest of each depended on the contingency of survivorship; and, it seems evident that she could not, by a sale of the policy without the consent of the other beneficiaries, any more than could they by sale without her consent, confer any title on the purchaser, nor could either, without the concurrence of all, surrender the policy, or accept a paid up one in its stead. A judicial sale of the policy in an action against the defendant alone, could have no different effect. An interest so unascertainable, separate from that of the other beneficiaries, and of such unappreciable value, can scarcely be regarded as a separate property which the defendant intended to charge, or could charge with the burden of the contract in suit. An attempt to pursue it by action would be barren of any practical result. For this

reason, presumably, the claim of the plaintiff in that direction is not pressed with much earnestness. The principal reliance of the plaintiff is placed on the proposition that the insurance money, when paid to the defendant, took the place of the policy, and by relation became her separate property as of the time of the contract. This position, we think, cannot be maintained. The augmented value of the policy arising from the payment of the premiums and performance of its conditions subsequent to the contract, resulting in the final collection of the insurance money, was after acquired property, which after acquisition, as has already been seen could not relate back so as to give validity to a contract invalid when made, or become chargeable for its satisfaction.

Judgment reversed, and judgment for plaintiff in error.

MINSHALL, C. J., BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

THE KNOX ROCK BLASTING CO. v. THE GRAFTON
STONE CO.

*Contract for use of patent right—For given time at annual rate
—Use by licensee after expiration of term—Licensee to pay
double former rate—Liquidated damages—Validity of con-
tract.*

1. Where the parties to a contract for the use of a patent right for a certain time at a given annual rate as a license fee, agree that, if the licensee, continues to use it after the expiration of the term without obtaining a license therefor, the licensee shall pay double the former rate for each year in which it is used, the agreement is not unlawful or against public policy, but in the nature of liquidated damages; and may be recovered as such on a breach of the agreement.
2. Whether it should not be treated simply as an agreement for the payment of a stipulated license fee after the lapse of a certain period, depending upon the option of the licensee to continue the use. *Quere?*

* (Decided March 26, 1901.)

ERROR to the Circuit Court of Lorain county.

Hoyt, Dustin & Kelley and *A. R. Webber*, for plaintiff in error, cited the following authorities: *

Story on Agency, Sec. 452; *Railroad Co. v. Derby*, 55 U. S. (14 How.), 468; *Cosgrove v. Ogden*, 49 N. Y., 255; *Garretzen v. Duenckel*, 50 Mo., 104; *Betts v. DeVitre*, L. R. 3 Ch., 441; *Lange v. Werk*, 2 Ohio St., 519; *Sedgwick on Damages*, 422; *Dwinel v. Brown*, 54 Me., 468; *Morse v. Rathburn*, 42 Mo., 594; Story on Contracts, Sec. 1021; *Williams v. Green*, 14 Ark., 315; *Crisdee v. Bolton*, 3 C. & P., 240; *Cotheal v. Talmage*, 9 N. Y., 551 (Court of Appeals); *Slosson v. Beadle*, 7 Johns., 72; *Mundy v. Culver*, 18 Barb., 336; *Hosmer v. True*, 19 Barb., 106; *Edmund v. Van Beneschoten*, 12 Barb., 366; *Williams v. Dakin*, 22 Wend.,

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201; *Tode v. Gross*, 127 N. Y., 480; *Texas & St. L. Ry. Co. v. Rust*, 19 Fed. Rep., 239; *Lynde v. Thompson*, 2 Allen, 456; *Williams v. Vance*, 30 Am. Rep., 26; *Astley v. Weldon*, 2 B. & P., 346; *Dakin v. Williams*, 17 Wend., 447; *Bearden v. Smith*, 11 Rich., 550; *Galsworthy v. Strutt*, 1 Exch., 659; *Hurst v. Hurst*, 4 Exch., 571; *Hasbrook v. Tappen*, 15 Johns., 200; *Knapp v. Maltby*, 13 Wend., 587; *Price v. Green*, 16 M. & W., 346; *Sainter v. Ferguson*, 7 Mann., Gran. & Scott, C. B. Rep., 716; *Pearson v. Williams*, 26 Wend., 360; *Story Eq. Jurp.*, 13 Ed., Sec. 1314; *Dermott v. Wallach*, 68 U. S. (1 Wall.), 61.

E. G. Johnson, for defendant in error, cited the following authorities:

9 Am. & Eng. Ency. Law, 913; 17 Am. & Eng. Ency. Law, 126; *Taylor on Corps.*, Sec. 753; *Lange v. Werk*, 2 Ohio St., 519; *Berry v. Wisdom*, 3 Ohio St., 241.

MINSHALL, C. J. The case below was brought by the Knox Rock Blasting Company against the Grafton Stone Company on a contract by the terms of which the latter company was to pay to the former certain license fees for the use of certain tools and methods in blasting rock, covered by certain letters-patent owned by the plaintiff. The contract bore date May 22, 1888, and was to continue in force for the term of one year from that date, the Stone Company paying to the Blasting Company the sum of \$250 for the use of the tools and method. It also provided that the Stone Company should have the privilege of an extension of the term of the license for the period of five years from May 21, 1889, at the same rate per annum. At the termination of the first year of the contract the defendant availed itself of

the privilege and the agreement was extended and continued for the period of five years beginning with May 22, 1889, and ending May 21, 1894, the defendant regularly paying the stipulated sum of \$250 annually for the use of the tools and method. The contract contained the further provision, which is as follows:

"It is further mutually understood and agreed that, in case the party of the second part shall, at any time after the termination of this license, as set forth in any previous paragraph hereof, use or apply any of the tools or methods protected by the letters-patent referred to above, without having first obtained a new license from the party of the first part, then and in that case *the license fees shall be double the sum specified in this license for at least the term of one year, and thereafter from year to year at the increased rate so long as any use shall be made of said tools or methods, not exceeding, however, the life of the patents.*"

The principal issue of fact made in the case by the answer of the defendant was whether the tools and method covered by the license were used in its quarries after May 21, 1894. On this the jury rendered a special verdict in answer to certain questions propounded to them by the court. It found that they were used in the year from the 22nd day of May, 1894, to the 21st day of May, 1895; that they were not used in the next year, but were used in the year between the 22nd day of May, 1895, and May 21, 1896. There was also an issue of fact as to whether this was authorized by the company. The evidence is not incorporated in the printed record, nor does the defendant prosecute error, and these questions must, therefore, be taken as settled by the verdict; that is,

that a use was made of the patent in the years as found by the jury, and that this was authorized by the defendant. The court charged the jury to the effect that the stipulation for the payment of a license fee of \$500, should the defendant use the patent after May 21, 1894, without license, was in the nature of a penalty; and that if it was so used, their verdict must be limited to damages *actually proven* by plaintiff for such use. To this the plaintiff excepted; and asked for a charge that if it was so used, then their verdict should be for the sum of \$500 for each year during which the jury found any use to have been made of the tools and method covered by the patent; which the court refused and the plaintiff excepted. The jury rendered a verdict for \$129.02. The plaintiff filed a motion for a new trial, also, a motion for a judgment of \$1,000 on the special findings of the jury. Both of these motions were overruled and exceptions taken. On a bill of exceptions the case was taken to the circuit court which affirmed the judgment of the common pleas, and the case is brought here for a reversal of both courts, and a judgment on the special findings for the plaintiff in the sum of \$1,000.

The only question then of law presented by the record, except one as to the validity of the contract which we shall consider later, is whether what was to be paid in case the defendant should use the method and tools after May 21, 1894, without license, was in the nature of a penalty, or, of liquidated damages. We think it was of the latter character, or, more properly, an agreement by which the defendant might continue the use of the patent after that time without license by annually paying \$500.

When the agreement was made in 1888 both parties may have been and probably were, uncertain as to what the value of the use of the patent might be at the end of six years thereafter. It might be more or less than \$250, the value agreed on for the term. As it might be more, the defendant might be willing from and after that time to pay \$500 annually for it, and under the contract it could do this, without further permission from the plaintiff, by paying that sum as long as it used it. On the other hand, whilst the plaintiff in 1888 might not have been willing to let the patent indefinitely at the rate of \$250 annually to be paid, was willing to agree that after 1894 the defendant might continue to use it for an indefinite time by paying at the rate of \$500 annually, as long as it was used. Certainly the parties had the right to make such a contract. It violated no principle of law or public policy, and we can see no reason why it should not be enforced. The probable value of the patent being uncertain when the contract was made, the plaintiff protected itself from an obligation for an indefinite time to receive for its use less than it was worth, and the defendant secured the right to continue its use after the end of the term fixed at the rate of \$500, though the use might be worth more; and if the use of it was worth less than that sum, it was at liberty to discontinue the use without further liability. In this case the contractual relation of the parties would be at an end, and they would be at liberty to make a new contract upon such terms as they saw fit, or to abandon the relation entirely.

In the view we take of this case there is room for doubt whether it presents the question, whether the stipulation is in the nature of a penalty, or, of liquidated damages. It seems, as we have indicated, to

have been what the parties agreed on as the *license fee* that should be paid in case the defendant saw fit to continue to use the tools and method after the expiration of the term agreed on. It was quite as competent for the parties to agree about this as to agree on the rate for its use in the first instance. But should we be wrong in this, it is still clear, that the stipulation must be regarded as liquidated damages. As the parties could not know in 1888 what the value of the use of the patent might be after 1894, it was certainly a proper subject for agreement between them as to what should be paid as damages, should the defendant continue to use the patent without license after the expiration of the term, and this they did by agreeing on the sum of \$500. It could hardly have been the intention of the parties, that the right of the plaintiff, in case use should be made of the patent after the expiration of five years, should be limited in each year, to the actual damages he might be able to show that he sustained, from the use made. It would be difficult to lay down a principle by which such damages could be estimated by a jury; and would have imposed on him a vigilance as to the use made, that it is not likely that he would have assumed. Hence they agreed what he should receive, in case any use was made of the patent contrary to the agreement. Many analogous instances are to be found in which the agreement was held to be liquidated damages. See 2 Greenleaf on Evidence, section 259. Ordinarily where the sum fixed is to secure the payment of a less sum, or a sum capable of ascertainment by calculation, the sum fixed will be regarded as discharged by the payment of the less sum; but if the sum to be paid is uncertain at the time and may vary with circumstances, the parties may fix the same by

agreement and it will be regarded as liquidated damages. In *Price v. Green*, 16 M. & W., 346, it is said by Best, C. J.:

"The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves. I think that the parties to contracts from knowing exactly their own situations and objects can better appreciate the consequence of their failing to obtain these objects than either judges or juries. Whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it, to the party to whose prejudice it is broken, the verdict in an action for breach of it should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of an instrument ascertaining the amount of damages, than it has to decide contrary to any of its other clauses. Our office is to ascertain the intent of the parties, and if not contrary to law, to carry their intent into execution."

In the well considered case of *Dwincl v. Brown*, 54 Me., 468, which was a suit to recover the stipulated damages for the breach of an agreement to put teams on the plaintiff's land and carry on a lumbering operation and pay an agreed amount for stumpage, the court said:

"The parties themselves best know what their expectations are in regard to the advantages of their undertaking and the damages attendant on its failure, and when they have mutually agreed on the amount of such damages in good faith and without illegality, it is as much the duty of the court to enforce that agreement as it is the other provisions of the contract. In construing the other parts of the con-

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tract, so in giving construction to the stipulation concerning the damages, the intention of the parties governs."

The court added the following sensible comment :

"It is the province of the court to uphold existing contracts, not to make new ones. It is not for the court to sit in judgment upon the wisdom or folly of the parties in making the contract, when their intention is clearly expressed and there is no fraud or illegality. No judges, however eminent, can place themselves in the place or position of the parties when the contract was made, scan the motives and weigh the considerations which influenced them in the transaction, so as to determine what would have been best for them to do, who was least sagacious or who drove the best bargain. * * * The interests of the public are quite as likely to be subserved in maintaining the inviolability of contracts as they are in contriving ways and means to make a contract mean what is not apparent on the face of it to save a party from some conjectural inequity growing out of the supposed inadvertence or improvidence."

So that if we treat the case before us as one in which the parties stipulated what the damages should be for a breach of the contract, rather than as an agreement as to the license fee to be paid should the defendant continue the use of the patent after a certain term, the result must be the same; the actual damages were uncertain and incapable of calculation, so that the sum agreed on must be regarded as liquidated damages.

Judgment vacated, and judgment for the plaintiff in error in the sum of \$1,000.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK,
JJ., concur.

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64	369
68	580

Divorce to wife for aggression of husband—Alimony adjudged wife by agreement of parties—Terms of alimony agreement not subject to modification upon petition filed by husband, when.

A divorce being decreed for the aggression of the husband, and alimony being adjudged to the wife in accordance with an agreement of the parties, the terms of the decree as to alimony are not, if unaffected by fraud or mistake, subject to modification upon a petition filed by the former husband after the term at which the original decree was made.

(Decided March 26, 1901.)

ERROR to the Circuit Court of Hamilton county.

On the 1st day of August, 1889, Carrie B. Law was, by the judgment of the court of common pleas of Hamilton county, divorced from George W. Law for his aggression. After adjudging that the parties be divorced and that the custody of their child, Edith B. Law, should be given to Mrs. Law, the judgment entered made the following provisions as to alimony:

"It is further ordered and decreed that the said defendant pay as alimony to said plaintiff, annually, the sum of three thousand dollars (\$3,000), payable in monthly installments of two hundred and fifty dollars (\$250) each, the first installment to be paid on the first day of August, 1889, and out of which said sum the said plaintiff is to support said Edith, maintain and educate her.

"It is further ordered and decreed that in case the said plaintiff shall marry, the alimony herein provided and ordered to be paid to her, shall cease from and after said marriage, but the said defendant shall continue to pay to said plaintiff, for the maintenance,

support and education of said child, Edith B. Law, the sum of fifteen hundred dollars (\$1,500) annually, payable in monthly installments of one hundred and twenty-five dollars (\$125) each, and the same shall continue so long as the said Edith B. Law shall remain unmarried.

"It is further ordered and decreed that said alimony shall cease and wholly determine upon the death of the defendant, George W. Law, and that said plaintiff shall have no right, claim or demand to any part of the estate or property which he may leave, on condition, however, that the said George W. Law shall, of the insurance that he now holds upon his life, or which he may hereafter procure, and which he agrees to do, set apart the sum of fifteen thousand dollars (\$15,000) for the benefit of said plaintiff, Carrie B. Law, which policies of insurance, in the event of the death of the said George W. Law, shall be payable to and paid to said Carrie B. Law, and in case of the death of the said Carrie B. Law before the maturity of the said policies by the death of said George W. Law, the same shall be payable to said child, Edith B. Law, and this insurance in the sum of \$15,000, the court, by consent of said defendant, orders and adjudges that he faithfully maintain and keep up for said purpose.

"It is further, and with the consent of said defendant, ordered and decreed that the said defendant, George W. Law, forthwith secure to the said plaintiff and the said child, Edith B. Law, the payment of the said sum of three thousand dollars (\$3,000) annually, in the manner and at the times herein provided, and the procuring, setting apart, keeping and maintaining at all times the policies of insurance upon his life in reliable and responsible companies in

the sum of fifteen thousand dollars (\$15,000) for the benefit of said plaintiff and the said child, Edith B. Law, as herein provided.

"It is further, and by and with the consent of said defendant, ordered that the security for the payment of the sums herein provided, and the procuring, setting apart, keeping and maintaining the policies of insurance for the purposes herein declared, shall be subject to the approval and satisfaction of the said plaintiff.

"It is further ordered, adjudged and decreed, that the provisions herein made for and on behalf of the said Carrie B. Law as to alimony, shall be in lieu of, and in full satisfaction of all claims, rights, interests or demands that said plaintiff has or may have acquired in the property and estate of the said defendant by reason of her marriage to him, and the said plaintiff shall relinquish any and all such interests by instrument in writing duly executed upon the demand of said defendant."

On the day preceding the entry of this decree George W. Law, with surety, gave bond to Mrs. Law for the payment of alimony according to the terms which were carried into the decree. On the 11th day of April, 1894, George W. Law filed his petition in the court of common pleas seeking a reduction of the alimony to fifteen hundred dollars a year, and of said insurance to seventy-five hundred dollars on account of reasons occurring after the entry of the decree of August, 1889. Mrs. Law answered denying that any change had occurred to justify a reduction of said amounts, and she alleged in her answer that in so far as the decree of 1889 related to the subject of alimony and insurance they were entered by agreement of the parties. These allegations of the answer

were denied in the reply. On a hearing the court of common pleas entered a judgment reducing the alimony from three thousand dollars per annum to eighteen hundred dollars per annum. Mrs. Law took an appeal to the circuit court where, upon a hearing, the alimony was fixed at twenty-two hundred dollars per annum in lieu of the three thousand dollars per annum awarded by the original decree. Afterward she received and accepted the amount adjudged to her by the circuit court. She now seeks a reversal of the judgment by which the amount awarded to her by the terms of the original decree was reduced.

Thomas McDougal; Alfred C. Cassatt and Harmon. Colston, Goldsmith & Hoadley, for plaintiff in error, cited the following authorities:

Olney v. Watts, 43 Ohio St., 499; *Pretzinger v. Pretzinger*, 45 Ohio St., 452; *Storey v. Storey*, 125 Ill., 608; *Collier v. Collier*, 66 Ill. App., 484; *Buck v. Buck*, 60 Ill., 241; *Parkhurst v. Parkhurst*, 118 Cal., 18; *Galusha v. Galusha*, 116 N. Y., 635; *Petersine v. Thomas*, 28 Ohio St., 596; *Fischli v. Fischli*, 66 U. S. (1 Black.), 360; *Semrow v. Semrow*, 23 Minn., 214; *Julier v. Julier*, 62 Ohio St., 90; *Stratton v. Stratton*, 77 Me., 373; *Crews v. Mooney*, 74 Mo., 26; 2 Bishop on Mar. & Div. (6 Ed.), Sec. 435; 2 Nelson, Div. & Sep'n, Sec. 915; *Kremelsberg v. Kremelsberg*, 52 Md., 553; *Plaster v. Plaster*, 47 Ill., 290; *Dow v. Dow*, 38 N. H., 188; 2 Nelson on Div. & Sep'n, Sec. 905a, p. 849; 2 Am. & Eng. Ency. (2d ed.), 117; *Fuller v. Fuller*, 33 Kan., 582; *Wilhite v. Wilhite*, 41 Kan., 154; *Stewart v. Vandervoort*, 34 W. Va., 524; *Callame v. Callame*, 24 N. J. Eq., 444 (cited with approval, *Gallagher v. Fleury*, 36 Ohio St., 590); *Chenault v. Chenault*, 5 Sneed, at p. 251; *Boggers v.*

Boggers, 6 Baxter, 300; *Bird v. Bird*, 1 Lee's Rep., 621 (A. D. 1754); *Aughtie v. Aughtie*, 1 Phil. 201 (A. D. 1810); *Scrimshire v. Scrimshire*, 2 Haggard's Consistory Rep., 395; *Gallagher v. Fleury*, 36 Ohio St., 590; *Fisher v. Fisher*, 32 Iowa, 20; *McGee v. McGee*, 10 Ga., 477; *Wheeler v. Wheeler*, 18 Ill., 39; *Rogers v. Vines*, 6 Ired., 293; *Lockridge v. Lockridge*, 2 B. Mon., 258; *De Blaquiere v. De Blaquiere*, 3 Hagg. Rep., 329; *Foulkes v. Foulkes* (Poynter on Mar. & Div., *p. 256, note "q"); *Cox v. Cox*, 3 Add., 276; *Sammis v. Medbury*, 14 R. I., 216; *Sampson v. Sampson*, 16 Id., 456; *Kamp v. Kamp*, 59 N. Y., 215; *Mitchell v. Mitchell*, 20 Kan., 666; *Howell v. Howell*, 104 Cal., 47; *Smith v. Smith*, 45 Ala., 267; *Fries v. Fries*, 1 McArthur (D. C.), 294; *King v. King*, 38 Ohio St., 370; *Woods v. Waddle*, 44 Ohio St., 449, *Beals v. Lewis*, 43 Ohio St., 220; *Embry v. Palmer*, 107 U. S., 3; *Merrian v. Hass*, 3 Wall., 687; *United States v. Dashiell*, 70 U. S. (3 Wall.), 688; *Morriss v. Garland*, 78 Va., 234; *Philips v. Towles*, 73 Ala., 411; *State v. Railway Co.*, 21 Nev., 172; *Fiedler v. Howard*, 99 Wis., 395; *Clowes v. Dickenson*, 8 Cowen, 327; *Higbie v. Westlake*, 14 N. Y., 288; *Matthews v. Davis*, 39 Ohio St., 54; *Tabler v. Wiseman*, 2 Ohio St., 207; *Merritt v. Horne*, 5 Ohio St., 307; Elliott on Appellate Procedure, Sec. 151.

William Worthington and Pogue & Pogue, for defendant in error, cited the following authorities:

Price v. Price, 10 Ohio St., 316; *Reed v. Reed*, 17 Ohio St., 563; *Taylor v. Taylor*, 25 Ohio St., 71; *Hixson v. Ogg*, 53 Ohio St., 361; *Cox v. Cox*, 19 Ohio St., 502; *Olney v. Watts*, 43 Ohio St., 499; *Pretzinger v. Pretzinger*, 45 Ohio St., 452; *Hoffman v. Hoffman*, 15 Ohio St., 427; *Neil v. Neil*, 38 Ohio St., 558; *Rogers*

v. *Rogers*, 51 Ohio St., 1; *Petersine v. Thomas*, 28 Ohio St., 596; *Stevenson v. Morris*, 37 Ohio St., 10; *Burckhardt v. Burckhardt*, 42 Ohio St., 474; *Cincinnati v. Railway Co.*, 56 Ohio St., 675; *In re Potts*, 166 U. S., 263; *Weidman v. Weidman*, 57 Ohio St., 101; *Meissner v. Meissner*, 5 Circ. Dec., 305 (11 R., 1); *Conrad v. Everich*, 50 Ohio St., 476; *Taylor v. Fitch*, 12 Ohio St., 169; *Reeves v. Skenett*, 13 Ohio St., 574; *McRoberts v. Lockwood*, 49 Ohio St., 374; *Hocking Coal Co. v. Rosser*, 53 Ohio St., 12; *Beals v. Lewis*, 43 Ohio St., 220; *Waddington v. Waddington*, 27 Mo. App., 596; *Alexander v. Alexander*, 104 N. Y., 643; *Bolen v. Cumby*, 53 Ark., 514; *Holt v. Rees*, 46 Ill., 181; *Elliott on Appellate Procedure*, Secs. 150-152; 2 Ency. Pl. and Prac., pp. 174-177; *Cogswall v. Colley*, 22 Wis., 399; *Webster v. St. Croix*, 71 Wis., 317; *Shingler v. Martin*, 54 Ala., 354; *Tyler v. Shea*, 4 No. Dak., 377; *Railway Co. v. Johnson*, 84 Ind., 420; *Anglo-American L. M. & A. Co. v. Bush*, 84 Iowa, 272; *Harte v. Castetter*, 38 Neb., 571; *Gibson's Appeal*, 108 Pa. St., 245; *Brewer v. Connecticut*, 9 Ohio, 189; *Rosebrough v. Ansley*, 35 Ohio St., 107; *Pacific Railroad v. Ketchum*, 101 U. S., 289; *United States v. Babbitt*, 104 U. S., 767; *Cooch v. Cooch*, 18 Ohio, 146; *Jackson v. Jackson*, 16 Ohio St., 163; *Zanesville v. Gas-light Co.*, 47 Ohio St., 1; *Mosier v. Perry*, 60 Ohio St., 388; *Fulton v. Fulton*, 52 Ohio St., 229; *Bank v. Owensboro*, 173 U. S., 636; *Doyle v. Doyle*, 50 Ohio St., 330; *Grever & Sons v. Taylor*, 53 Ohio St., 621; *Kerr v. Kerr*, 59 How. Prac., 255; *King v. King*, 38 Ohio St., 370; 2 Bishop's M. & D., Sec. 553; *State v. Hueston*, 44 Ohio St., 1; *Mays v. Cincinnati*, 1 Ohio St., 268; *Fitch v. Carroll*, 1 Sawyer, 156; *South v. Dennison*, 2 Watts, 474; *Commonwealth v. Murray*, 4 Binney, 487; *Bartley v. Richtmyer*, 4 N. Y.,

38; *Spoors v. Coen*, 44 Ohio St., 497; *Bellefontaine v. Vassaux*, 55 Ohio St., 323 (36 B., 322); *Jack v. Hudnall*, 25 Ohio St., 255; *Phillips v. Herron*, 55 Ohio St., 478; *Kamp v. Kamp*, 59 N. Y., 212; *Erkenbrich v. Erkenbrich*, 96 N. Y., 456.

BY THE COURT:

1. The view presented by counsel for the plaintiff in error is that the terms of the original decree, not being affected by fraud or mistake, were conclusive upon the subject of alimony and not subject to modification for any reason. Since no question was reserved by the decree for future consideration, that view receives strong support from *Petersine v. Thomas*, 28 Ohio St., 596, and from the general course of decisions upon the subject. Authority for the subsequent modification of the decree is, however, said to be found in the later case of *Olney v. Watts*, 43 Ohio St., 499. In that case there had been a divorce because of the wife's aggression, and the holding was that the decree as to alimony, so-called, might be modified upon the petition subsequently filed by the husband for that purpose. If it be assumed that the case was correctly decided, it affords no warrant for the present judgment, for it concedes that where the terms of a decree as to alimony are fixed by the court pursuant to an agreement of the parties they are not subject to modification.

That the terms of the decree of August, 1889, as to alimony, were fixed by agreement of the parties is the proper inference from the testimony of counsel who were concerned in the case. It is rendered certain by the bond executed prior to the decree, whereby the husband bound himself to pay alimony according to the terms of the decree subsequently en-

tered. It is made conclusive by the terms of the decree. The divorce in the present case was on account of the aggression of the husband, and it was therefore a case for alimony properly so called. The wife had not forfeited any of the rights which marriage gave her in the property of her husband. The concluding terms of the decree against the wife, assented to by her, and precluding the further assertion by her of any interest in the husband's estate are in law, as they purport to be, in consideration of the antecedent provision as to alimony. The provisions in her favor, being consideration for those which were adverse to her, must be final according to their terms.

2. There is no merit in the contention that Mrs. Law's acceptance of the amount awarded to her by the circuit court in lieu of the amount fixed by the decree of 1889, estops her from prosecuting this proceeding in error. She has taken nothing by the judgment of the circuit court. By the terms of the decree of 1889 she became conclusively entitled to all she has received, and more. It can not be said that by accepting a portion of the sum due her by the terms of the original decree she has waived her right to insist upon payment of the remainder.

Judgment reversed and original petition dismissed.

MINSHALL, C. J., WILLIAMS, DAVIS and SHAUCK, JJ., concur.

STATE OF OHIO EX REL. HYGEA MEDICAL COLLEGE
v. COLEMAN ET AL., AS THE OHIO STATE BOARD
OF MEDICAL REGISTRATION AND EXAM-
INATIONS.

Writ of mandamus—Will not issue to compel State Registration Medical Board— To recognize college as medical institution in good standing—Nor compel board to issue certificates to holders of diplomas.

The writ of mandamus will not issue, on the relation of a medical college, to compel the State Board of Medical Registration and Examination to recognize the college as a medical institution in good standing, nor to compel the board to issue certificates to practice medicine in this state, to holders of diplomas from such college.

(Decided March 26, 1901.)

MANDAMUS.

This action is brought to compel the State Board of Medical Registration and Examinations to recognize the relator as a "legally chartered medical institution in good standing," and to issue to its graduates who may hereafter apply to the Board for that purpose, certificates authorizing them to engage in the practice of medicine in this state. The petition is as follows:

"The plaintiff says: That the defendants constitute the Ohio State Board of Medical Registration and Examination, under the provisions of section 4403, Revised Statutes of Ohio, as amended February 27, 1896, 92 Ohio Laws, page 44.

"1. Plaintiff further says that the relator was duly incorporated under the laws of the said state of Ohio, on the 4th day of October, 1893, as a medical college, at Cincinnati, Ohio, and thereafter at once fully per-

fecting its organization, acquired property, and on the 6th day of November, 1893, its trustees filed in the office of the secretary of state of Ohio, a schedule of the kind and value of a part of its property in value over five thousand dollars (\$5,000), which schedule was verified by the oaths of its trustees, and thereupon said trustees appointed a president, professors, tutors, and other agents and officers, as provided in section 3726, Revised Statutes of Ohio, which was then and is now, as follows:

"Sec. 3726. 'The trustees of a college, university, or other institution of learning incorporated for the purpose of promoting education, religion, morality, or the fine arts, which has acquired real or personal property of the value of five thousand dollars, and which has filed in the office of the secretary of state a schedule of the kind and value of such property, verified by the oaths of the trustees, may appoint a president, professors, and tutors, and any other necessary agents and officers, and fix the compensation of each, and may enact such by-laws, not inconsistent with the laws of this state or of the United States, for the government of the institution, and for conducting the affairs of the corporation, as they may deem necessary; and may, on the recommendation of the faculty, confer all such degrees and honors as are conferred by colleges and universities of the United States, and such others having reference to the course of study, and the accomplishments of the student as they may deem proper.'

"That thereupon this relator became vested with the certain rights granted in said section, and has sought to enjoy the same ever since as it lawfully might. That among said vested rights is the right to carry on a medical college; and the right to grant

diplomas to, and confer the degree of doctors of medicine upon its regular graduates; and the right to enter into various contracts necessary and proper for such purposes, which said relator has done. That said law of February 1896, 92 O. L., 44 [Sec. 4403c. Rev. Stat.], under which said board was organized required a graduate of medicine, or surgery, before practicing either, to present his diploma to said board 'for verification.' That said law further provided 'accompanying such diploma the applicant shall file his affidavit, duly attested, stating that the applicant is the person named in the diploma and is the lawful possessor of the same, and giving his age and the time spent in the study of medicine. If the board shall find the diploma to be genuine, and from a legally chartered medical institution in good standing, as determined by the board, and the person named therein be the person holding and presenting the same, the board shall issue its certificate to that effect, signed by its president and secretary.' That the provision of said law 'in good standing as determined by the board' 'gives to said board an unlimited power and discretion by adverse action to render totally useless and valueless the valuable franchises granted by the state to this relator, which impairs and destroys its vested rights aforesaid, imposes new and unreasonable burdens upon it, puts within the uncontrolled power of said board, without the right of appeal to this relator, its very existence, and is, therefore, in this particular in conflict with section 28, article 2 of the constitution of Ohio as being retroactive, and impairing the obligation of contracts; and in conflict with section 10, article 1 of the constitution of the United States, and also the fifth and fourteenth amendments thereto, as impairing the ob-

ligation of contracts and depriving the relator of its property without due process of law.

"2. Plaintiff further says that said law of February 27, 1896, recognized all schools of medicine then existing in this state, of which this relator was one, and provided for their proportionate representation on said board, but that this relator was ignored in the formation of said board, because of the unreasonable antagonism and prejudice against it, as a new school of medicine, by the older school followers, and graduates, who secured all the appointments thereon, as was arranged by them while the law was pending, and before its final passage. That this relator was organized, and has been conducted as, in effect, a new school of medicine, along progressive, modern, and logical lines of thought, involving in brief, the treatment of diseases by the use primarily of strictly hygienic measures, and discouraging and minimizing the use of drugs, especially those of a poisonous character, although fully teaching in the regular way their uses and abuses, and in this it was, and is, the only school of its kind in Ohio, and has received at the hands of other schools and their graduates and adherents, the usual unfair, one-sided, and sometimes malicious treatment accorded a new school, by those that are older, and established upon different lines of thought and practice. That the members of said board are adherents and graduates of other schools of medicine, and are not free from the prevailing prejudice existing among them against this relator as a new school, and that the president of said board has been especially hostile, illiberal, and arbitrary towards this relator, without cause therefor.

"That the first session of this relator commenced on the 4th day of January, 1894, and that regular sessions have been held each year since up to the time of the first adverse action of said board hereinafter set forth, and since then in all classes having students in attendance. That in length of sessions, number of years for graduation, curriculum, equipment, entrance qualifications, final examinations, recommendation of faculty to graduate, and in all other essential matters connected with the conduct of a medical college, this relator has always conformed to the law, the practice of reputable medical colleges in Ohio, and the suggestions of the American Association of Medical Colleges of the United States. That its students have been fully and carefully prepared and instructed in all the branches of medical study, by able and competent professors and teachers, with facilities ample for that purpose, and have been given diplomas only when thoroughly qualified for the responsible duties of doctors of medicine, and that this relator is now, and since its first incorporation has been, 'a legally chartered medical institution in good standing' in this state.

"That said board in 1896 adopted resolutions defining what medical colleges must teach in order that they might be recognized by the board as 'in good standing,' and that this relator has at all times taught its students all and more than the terms of said resolutions expressed, and in every respect has not been deficient thereunder. That full information of the work and purposes of this relator have been from time to time furnished said board, and that nothing has been misrepresented or concealed. That since 1896 the faculty of the relator has been composed of reputable physicians, in active practice, duly registered by

said board, except as to a small minority thereof who resided in Kentucky and Indiana, who were reputable, in full practice, and registered in their respective states. That the board of trustees of the relator are well known business men in Cincinnati, who have confidence from actual experience in the school of medicine adopted by the relator, as said defendants have been repeatedly informed. That said defendant board has never made a full, careful, and impartial investigation of this relator, has never by committee or otherwise attended any of its lectures, but has simply contended itself with a show of fairness to cover a tacitly predetermined adverse decision. That in the summer of 1896 said board examined under oath certain of the then faculty of this relator, whose testimony clearly affirmed its good character, and plainly described its policy as a school. That at about the same time said board appointed a committee of Cincinnati physicians, not on said board, to examine and report upon the equipment of this relator, and that said committee did examine the same, and reported the relator as well equipped for a small college. That this plaintiff is informed and believes the members of the board at the same time, and at other times, did covertly and secretly, without notice to, or the knowledge of this relator, interview and examine other witnesses as to the character of this relator, who were prejudiced against it, thus depriving the relator of the opportunity to know and rebut the evidence against it. That after this hearing the board decided that this relator was not a 'legally chartered medical institution in good standing,' and so notified it, whereupon the relator requested said board to specify in what particulars it was deficient, which specifications the board declined to give. That

said board has never given this relator a fair hearing with knowledge of what was claimed against it, nor an opportunity to hear, know, and rebut, evidence adverse to it, nor has said board ever advised the relator of its objections, and given an opportunity to fairly hear and overcome the same. That three (3) members of the board in 1896, being the president thereof and the two (2) members from Cincinnati were connected with and interested in competing medical colleges, and endeavored to prevent, and have prevented, physicians from accepting places on the faculty of the relator, and have discouraged and discountenanced those already serving in that capacity, and that three (3) members of said board are a controlling number thereof, under the terms of said law making the concurrence of five (5) out of the seven (7) members thereof necessary for legal action.

"That in July 1898 the relator filed an application with said board for a reversal of its previous action, and recognition of the relator as 'in good standing,' and at the same time four (4) of its five (5) graduates of 1898 filed in due form of law with said board applications for certificates to practice medicine, and pending these various applications the trustees and faculty of the relator presented to said board a statement in writing of its proper conduct in the past, and a pledge of its future adherence to reputable methods and work. That said board filed said application, and seeking to harass, vex, and delay, and thus destroy the relator, inspired a suit in *quo warranto* in this court No. 6199 against the relator, without probable cause, and with malice, to oust it from its franchises, which suit was promptly dismissed on hearing. That in July 1899, after a full year of unnecessary and vexatious delays, the relator meantime urg-

ing fair hearing and action, said applications were rejected on the sole ground that the board had found that the relator was not 'a legally chartered medical institution in good standing,' and again no specifications were furnished against the relator, nor any fair and impartial hearing had thereon, although often requested, and that in the various particulars aforesaid said board has acted in gross abuse of the discretion vested in it by the law of its creation.

"That the turning down of this relator by said board was given by it to the public press, and heralded to the world, and resulted in crippling and practically destroying the business of the relator since 1896. That only five (5) persons have graduated and received diplomas since 1896, being those of 1898 aforesaid, and that others who had matriculated have dropped out by reason of the action of said board aforesaid, so that only two (2) of its many students now remain with the relator. That some years since 1896 have been entirely without a class, and the growing classes and patronage with which it was favored up to 1896, have been swept away by the adverse actions of said board, to the damage of this relator in the sum of \$25,000.00.

"Wherefore plaintiff prays a writ of mandamus requiring said board to recognize the relator as a 'legally chartered medical institution in good standing,' and to issue its certificates to the holders of diplomas from this relator, who may apply to it in proper form of law, and that this relator may recover damages in the sum of \$25,000.00, and costs."

The defendants have filed a general demurrer to the petition, upon which the cause is submitted to the court for final disposition.

A. M. Warner, for plaintiff in error, cited the following authorities:

State ex rel. v. Moore, 42 Ohio St., 103; *Merrill on Mandamus*, Secs. 40, 41.

F. S. Monnett and R. E. Westfall, for defendant in error, cited the following authorities:

State ex rel. v. Henderson, 38 Ohio St., 644; *State v. Haben*, 22 Wis., 660; *Stoddard v. Benton*, 6 Col., 508; Am. & Eng. Ency. of Law, Vol. 14, p. 19; Ency. Plead. & Prac., Vol. 13, p. 637; *France v. State*, 57 Ohio St., 1; *Spelling on Extraordinary Relief*, Vol. 2, paragraphs 1384, 1394, 1433, 1459, 1467, 1476, 1481, 1519, 1556 and 1577; Ohio Revised Statutes, Sec. 6742; *Ex parte Black*, 1 Ohio St., 30; *State v. Governor*, 5 Ohio St., 528; *State v. Nash*, 23 Ohio St., 568; *Commissioners v. Commissioners*, 24 Ohio St., 401; *State v. Commissioners*, 31 Ohio St., 211; *Rutter v. State*, 38 Ohio St., 496; *State v. Crites*, 48 Ohio St., 460; *State v. Commissioners*, 49 Ohio St., 301; *State v. Gregory*, 83 Mo., 123; *State v. McGrath*, 91 Mo., 386; *People v. Dental Examiners*, 110 Ill., 180; *Ex parte Black*, 1 Ohio St., 30; *State v. Benton*, 25 Neb., 834; *Davis v. Connors*, 63 Me., 396; *Vincent v. Bowes*, 78 Mich., 315; 25 Me., 333; *Moses on Mandamus*, 19; *High on Mandamus*, 536; 7 East., 345; 12 Ill., 254; 9 Neb., 92; *McKenzie v. Ruth*, 22 Ohio St., 371; 15 Barb., 607; *Kinhead Code Plead.* Vol. 2, Sec. 800 (2nd Ed.); *Black v. Auditor*, 26 Ark., 237; *People v. Chicago*, 25 Ill., 483; *Potts v. State*, 75 Ind., 336.

BY THE COURT:

The two specific acts, performance of which the court is asked to require of the board of medical examinations, are (1) the recognition, by the board, of

the relator as a legally chartered medical institution in good standing, and (2) the issuance of certificates to practice medicine to holders of diplomas from the relator, who may hereafter make application to the board for that purpose.

One of the grounds upon which this relief is sought is, that the provision of section 4403c, of the Revised Statutes, as amended February 27, 1896, (92 O. L. 44-5), which confers on the state board the power to determine whether a diploma, presented for its action, is one issued by a legally chartered medical institution "in good standing," and, if determined not to be so, to refuse to the holder of the diploma, a certificate to practice medicine, is in conflict with section 28 of article 2 of the constitution of this state, and of section 10 of article 1 of the federal constitution, being, it is claimed, retroactive in its operation, and in impairment of the obligation of contracts; and also in conflict with the fourteenth article of amendment to the federal constitution, in that it denies to parties due process of law. It would seem to be a sufficient answer to this ground of complaint that, if the statutory provision which confers on the state board the power to determine whether a medical institution whose diploma is presented for its action, is of good stand, is repugnant to so many constitutional inhibitions, it would be highly improper for the court to compel the board to exercise that power by recognizing the relator as a medical institution of the character required by the statute. However, it was held in *France v. State*, 57 Ohio St., 1, that the statute was not obnoxious to the constitutional provisions referred to.

The other ground on which the writ demanded is sought is, briefly stated, that, the refusal of the medi-

cal board to recognize the relator as an institution of the required standard, is purely arbitrary and the result of prejudice because the system taught by it is new and different from that adopted by other medical colleges. This does not appear to be a sufficient ground for granting the writ at the relator's instance. The proper scope of a proceeding in mandamus against an official board, is to command the performance of acts which the law has specifically enjoined upon it as a duty resulting from the office. Section 6741, Revised Statutes. Unless the duty is so enjoined, the remedy is inappropriate. A careful examination of the statutes fails to discover any provision authorizing an application to the board by a medical institution to obtain official recognition of its good standing, or any provision requiring of the board any official action in that behalf upon such an application. And such official action not being enjoined by statute, cannot be required by writ of mandamus. Nor, do we find any provision which makes it the duty of the board to determine in advance of an application for a certificate to practice medicine, whether a person holds a diploma from a medical institution of the proper standing. It is only when a diploma is presented upon such application, that the action of the board can be invoked. Whether, upon the refusal of the board to grant a certificate to an applicant, mandamus will lie on his relation, must depend upon the facts of each case. Such cases cannot be covered by a general order to grant certificates to the graduates of any particular college or institution, for, until an application is actually made, by one who then shows himself entitled to a certificate, the duty of the board to grant it does not arise. And then, for a refusal to perform that duty, the remedy be-

longs to the applicant, as the party directly interested, and not to the college on whose diploma the application was made, and whose interest is only remotely affected.

The statute does not define what shall constitute a medical institution "in good standing." Its language is that, "if the board shall find the diploma to be genuine, and from a legally chartered medical institution in good standing as determined by the board," etc., thus leaving the standing of the institution whose diploma is presented by an applicant, to be determined according to the best judgment of the board.

It is unnecessary to inquire here whether there may be cases in which the courts would undertake to correct or control the judgment of the board on this question. It is clear that the standing of a medical college within the meaning of the statute, is not to be determined alone from the course of study it has prescribed for graduation. The statute imports, at least, that the institution shall be one which has established a favorable reputation among members of the medical profession; and the board should not be required to recognize one, that, from the brief period of its existence, or the novelty of its system of treatment has not yet acquired such reputation, but might, in the judgment of the board, be considered as still in an experimental state. The statute has undoubtedly left much in this respect to the sound discretion of the members of the board, who, in passing upon the various applications presented to them, it must be assumed, will act as their official position requires, fairly, impartially, and justly to all concerned.

Demurrer sustained and petition dismissed.

City of Toledo v. Buechell.

THE CITY OF TOLEDO v. BUECHELL ET AL.

"Interest" to be excluded from amount of judgment under section 6710, Rev. Stat., defined.

Under Section 6710, Rev. Stat., as amended April 25, 1898, 93 Laws, 255, the "interest" that is to be excluded from the amount of the judgment in ascertaining the jurisdiction of the court, is the interest that may have accrued on the judgment, and not that which may have been included in it at the time it was rendered.

(Decided March 26, 1901.)

MOTION to dismiss for want of jurisdiction.

The plaintiff below brought suit against the city of Toledo to recover the amount of certain alleged unlawful exactions made of him by the city, and which he paid under duress. The amount claimed was \$294.50, with interest thereon from January 1, 1897. A judgment was rendered in his favor for \$332, which included the interest as claimed. On error the judgment was affirmed by the circuit court; and error is prosecuted here for the reversal of the judgment in both courts. The motion is on the ground that the amount involved, exclusive of interest and costs, is less than \$300.

M. R. Brailey, city solicitor, for plaintiff in error.

Wertman & Raymond, for defendants in error.

BY THE COURT:

It will be observed that section 6710, Revised-Statutes, conferring appellate jurisdiction on this court, as amended April, 25, 1898 (93 Laws, 255), with certain exceptions, limits its jurisdiction to the review of a judgment in which is involved a sum or value

greater than \$300, exclusive of *interest* and costs. This exclusion, however, as we construe the statute, relates to the interest that may have accrued on the judgment since, and not to any sum that may have been included in the judgment when rendered. The latter is merged in and becomes a part of the principal for which the judgment is rendered, and this amount determines the jurisdiction of the court. In this case the amount claimed on account of the alleged illegal exactions was \$294.50, which, with interest to the time of the rendition of the judgment, amounted to \$332, and for which judgment was rendered. The amount then involved in the judgment sought to be reviewed is greater than \$300.

Motion overruled.

SHAUCK, DAVIS, SPEAR, BURKET AND WILLIAMS,
JJ., concur.

THE CLEVELAND & ELYRIA ELECTRIC RAILROAD COM-
PANY v. HAWKINS.

64	391
66	406
64	391
68	150

Instructions of trial judge to jury—Sections 5190 and 5201, Rev. Stat.—General or special verdict—Submission to jury of questions to test their finding and conclusion of fact—Trial proceedings.

1. The seventh subdivision of section 5190 of the Revised Statutes requires the trial judge to give general instructions to the jury after the arguments of counsel are concluded.
2. The purpose of section 5201 of the Revised Statutes is to elicit from the jury such special findings of fact as will test the correctness of the general verdict, if a general verdict is returned; and it requires the court, upon request, to direct answers to be returned to such questions, stated in writing, as will elicit from the jury a finding of any fact whose legal effect may be, when considered with other facts admitted or to be found, to show whether or not the general verdict results from an erroneous application of the law; but it does not require the submission to the jury of questions whose purpose is only to ascertain the mental processes by which the jury may arrive at conclusions of fact.

(Decided April 16, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

Miss Hawkins brought her action in the court of common pleas to recover of the company for personal injuries alleged to have been sustained by her while a passenger on one of its cars, the injuries resulting from the negligence of its servants. She alleged that she took passage on the car at Cleveland to go to her home, about five miles distant in the direction of Elyria; that she had frequently been a passenger on the company's cars; that its servants had been accustomed to stop at a suitable and safe place in front of her residence to permit her to take or quit the car; that upon this occasion she gave timely notice of her

desire to quit the car at the usual place, but that the motorman negligently failed to stop the car until it had reached a point sixty feet beyond the usual stopping place where, owing to the presence of a ditch, it was unsafe for her to alight; that upon reaching the platform she hesitated to alight when the conductor leaped to the ground and extended his arm toward her and she, relying upon his judgment and his ability to protect her from injury, stepped from the car resting her weight upon his arms, and that the conductor gave her no support or assistance, but negligently permitted her to fall to the ground and receive serious injury.

The answer denied the negligence alleged against the company's servants, and alleged that if the plaintiff sustained injury, it was entirely due to her want of care. Upon the trial conflicting evidence was offered with respect to all the allegations of negligence. At the conclusion of the evidence the company's counsel presented to the court numerous special instructions in writing with the request that they be given to the jury before argument. Some of the instructions so requested were given in the general charge and others were refused. At the same time, before the argument, the court of its own volition, and against the objection of the company's counsel, gave to the jury its general instructions in the case.

Before the argument was begun counsel for the company presented several questions of fact stated in writing and requested the court to instruct the jury, if it should return a general verdict, to find specially upon said questions and to direct a written finding thereon. These requests were all refused, and to each refusal there was an exception. Among said questions was the following: "Was the place that the

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motorman selected for her to alight on the occasion of her injury a reasonably safe place for her to alight from that car with the assistance of the conductor?" In the court of common pleas there was a verdict for the plaintiff followed by a judgment and that judgment was affirmed by the circuit court.

Wilcox, Collister, Hogan & Parmley, for plaintiff in error.

O. L. Neff and *W. C. Rogers*, for defendant in error.

SHAUCK. J. It is said that in giving his general instructions to the jury before the argument against the objection of counsel for the plaintiff in error the trial judge erred. The reliance of counsel is upon the 7th subdivision of section 5190 of the Revised Statutes. The opposing view is that with respect to the time of giving general instructions, whether before or after the argument, the trial court is vested with a discretion by the introductory provision of that section. Since its amendment March 3, 1892 (89 O. L., 59), the section reads as following:

"When the jury is sworn the trial shall proceed, except as provided in the next section, in the following order, unless the court for special reasons otherwise direct:

"1. The plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it.

"2. The defendant must then briefly state his defense, and may briefly state the evidence he expects to offer in support of it.

"3. The party who would be defeated if no evidence were offered on either side must first produce

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his evidence, and the adverse party must then produce his evidence..

"4. The parties shall then be confined to rebutting evidence, unless the court, for good reasons, in the furtherance of justice, permit them to offer evidence in their original case.

"5. When the evidence is concluded, either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced.

"6. The parties may then submit or argue the case before the jury; the party required first to produce his evidence shall have the opening and closing argument, and if several defendants, having separate defenses, appear by different counsel, the court shall arrange their relative order.

"7. The court, after the argument is concluded, shall, before proceeding with other business, charge the jury; any charge shall be reduced to writing by the court, if either party, before the argument to the jury is commenced, request it; * * * ."

Prior to the amendment of the 5th subdivision the section provided that: "When the evidence is concluded either party may request instructions to the jury on matters of law which shall be given or refused by the court." It was then clearly competent for the court to give such requested instructions either before or after the argument, but to hold that such discretion remains would be to deny all effect to the amendment whose terms clearly require such requested instructions to be given before the argument, if that is desired by the party making the request.

That the amendment foreclosed discretion in that respect was decided in the *Village of Monroeville v. Root*, 54 Ohio St., 523. By the amendment the giving of such requested instructions before the argument is required by the same imperative language which is employed in the 7th subdivision of the section to enjoin upon the court the duty of giving its general instructions after the argument is concluded. The 5th and 7th subdivisions of the section relate to the same general subject, the instructions to be given to the jury, and no reason appears why the same language should be regarded as mandatory in the former and directory in the latter.

Counsel for the defendant in error urge the view that while the section prescribes the mode of conducting trials generally, it is qualified by the phrase: "unless the court for special reasons otherwise direct." This language is appropriate to confer upon the court authority to direct, for special reasons, the order of the statement of the claims of the parties, the introduction of the evidence and the arguments, because parties and their counsel are subject to the direction of the court. But the language is not appropriate to vest in the court a discretion with respect to its own conduct. A consideration of all the terms of the section leads to the conclusion that the requirement of the 7th subdivision, as well as that of the 5th, is imperative. Reasons for such a provision are not wanting. While the arguments which counsel address to juries relate to questions of fact they frequently proceed upon conflicting views of the rules of law applicable to the case, and there is obvious propriety in the requirement that their contentions shall be followed by an authoritative statement of the legal prin-

ciples by which the jury should be guided. The conflicting views of counsel cannot be anticipated by the court nor settled in a charge given before the argument.

It is further insisted that the trial judge disregarded the requirement of section 5201 of the Revised Statutes, in refusing to direct the jury to find specially upon questions of fact stated in writing and submitted with a request for such direction. The questions submitted were so numerous that it is not practicable to consider them separately. In determining the propriety of the rulings of the court upon these questions it is helpful to bear in mind that the proceedings were conducted in a court of law and not in a school of logic. The section of the statute relied on is as follows: "In all actions the jury, unless otherwise directed by the court, may, in its discretion, render either a general or a special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, the court shall instruct the jurors, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon, and the verdict and finding must be filed with the clerk and entered on the journal."

The character of the questions which may be propounded is determined by the purpose for which they are authorized. Information touching that purpose may be derived from reliable sources. By the terms of the section the jury need not find specially upon such particular questions unless a general verdict is returned. The object of the association of these special

findings with a general verdict is disclosed in the section following which provides: "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly." In *Morse v. Morse*, 25 Ind., 156, decided in 1865, the character of the questions to be propounded under a like statute was considered, and the conclusion reached is in accordance with the provisions of the statute. It was again considered by the same court in *Todd et al. v. Fenton et al.*, 66 Ind., 25. The purpose is to obtain findings upon all such particular questions of fact, and upon such only, as will test the correctness of the general verdict which such findings accompany. It is to provide means of ascertaining whether in the general verdict the jury have erred in the application of the law to their conclusions of fact. The court is accordingly required, if it be requested, to propound such questions as will elicit special findings upon questions of fact which are legally involved in and determined by the general verdict. This will extend the inquiry to every fact which is of such legal import that, when considered in connection with other facts, admitted or to be found, it may show that the general verdict results from an erroneous application of the law. But the statute does not contemplate that by means of such questions the jury may be quizzed respecting the mental processes by which they arrive at conclusions of fact. Its object is to enable the court to determine as a matter of law whether the general verdict is right in view of the jury's conclusions upon questions of fact, not to aid the court in determining whether the verdict is contrary to the weight of the evidence. Most of the questions stated in this record are of the latter character and they

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were therefore properly rejected. But the 4th question which is set out in the statement of the case, is an example of those which the section contemplates. and the trial judge erred in refusing to propound it.

Judgments of the circuit and common pleas courts reversed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR and DAVIS, JJ., concur.

HECKER v. MAHLER.

Promissory note—Signer appearing as original promissor—May, as between other signers, show he was guarantor or surety—Liability of other signers to surety signing without their knowledge.

1. Where a party to a promissory note so signs the same as to indicate, *prima facie*, that he was an original promissor, he may, as between himself and the other parties bound for the payment of the note, show that he was in fact a guarantor or additional surety.
2. When it is proved that one who is ostensibly a joint maker of a note, signed the same after the other makers as surety for them, or as guarantor, the principal makers will not be released from liability to indemnify the surety, or guarantor, who has paid the note, because such suretyship, or guaranty, was made without their knowledge or consent. A *fortiori* when made at the request of an agent of the principal makers, in order to make the paper acceptable for discount.

(Decided April 16, 1901.)

ERROR to the Circuit Court of Montgomery county.

The defendant in error was plaintiff in the court of common pleas; and in his petition alleged that the defendants, William C. Mahler, John Cox, Lemuel E.

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Heckler, Edwin H. Park and William J. Kronauge, with himself as surety, executed and delivered to the City National Bank the following promissory note:

"\$500.00.

Dayton, Ohio, Sept. 28, 1894.

Six months after date we promise to pay to the order of City National Bank, Five Hundred Dollars.

At

Value received.

W. C. MAHLER.

J. C. COX. WM. MAHLER.

L. E. HECKER, M. D.

E. H. PARK.

WM. J. KRONAUGE."

That at the maturity of the note the defendants did not pay the same, in consequence of which the plaintiff was compelled to and did pay it, and he prayed for judgment for the amount so paid. None of the defendants answered, except the defendant, Lemuel C. Hecker, who denied the allegations of the petition and averred that William Mahler signed the note without the knowledge or consent of Hecker; and all of the defendants signed the note as sureties for the Co-operative Publishing Company, which received the money thereon. The plaintiff replied denying that he signed the note without the knowledge and request of the defendants and averred that he signed the same at their request; and he denied that the Co-operative Publishing Company was in any way a party to the transaction. The verdict was for the defendant, Lemuel E. Hecker. A motion for new trial was overruled and a bill of exceptions taken, from which it appears that the defendants were directors and

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stockholders in the Co-operative Publishing Company; that the company was "hard pushed for money" and "had to have it or be closed up;" that the defendants made and signed the note and put it into the hands of two of their number, William C. Mahler and Kronauge, and they went to the bank to get the money on it; that the bank refused to accept the note, whereupon the note was taken by Kronauge to the plaintiff, who, according to his own undisputed testimony, thereupon at Kronauge's request, signed the note as "security for them five—for the five to get the money out of the bank;" but Kronauge then went back to the bank with the note which was again refused; and that plaintiff afterwards went to the bank with Kronauge and put up his building association book as collateral security and thereupon the note was accepted by the bank and the money paid over. At the maturity of the note the defendants did not pay it and the bank served notice on the plaintiff, and collected the money due to the plaintiff from the building association, kept so much thereof as paid off the note and turned over the surplus to the plaintiff. It does not appear that the defendant, Hecker, had any actual knowledge, before the final delivery of the note to the bank, of the signing of the note by the plaintiff. It also appears that in the charge to the jury the trial judge said: "I charge you that if Dr. Hecker—L. E. Hecker—defendant in this case, had no knowledge and it was without his consent prior to the discounting of that note at the City National Bank, that there is no liability on his part to Mr. Mahler." On proceedings in error, the circuit court reversed the judgment of the court of common pleas, for error in the charge to the jury. Hecker now seeks to reverse that judgment of reversal.

Young & Young, for plaintiff in error.

The following facts constitute important distinctions between this and many of the reported cases.

1. The note is joint in form, not several, or joint and several.

2. All parties signed on the face of the paper as makers under the words "we promise, etc."—none signed on the back.

3. Mahler executed no separate contract of guaranty or suretyship. He became a party to the contemporaneous contract of all the makers.

4. The suit is not to enforce the note. It is to recover money which Mahler claims he paid as surety to the use of the defendants as principals.

The material alteration of a bill by a party discharges all parties not consenting to it. 3 Randolph, Com. Paper, Sec. 1742; 2 Daniel, Neg. Inst., Sec. 1373; *Wallace v. Jewell*, 21 Ohio St., 163; *Boalt v. Brown*, 13 Ohio St., 364; *Patterson v. McNeely*, 16 Ohio St., 348; *Béry v. Railway Co.*, 26 Ohio St., 673; *Harsh v. Klepper*, 28 Ohio St., 200; *Jones v. Bangs*, 40 Ohio St., 139; *Wardlow v. List*, 41 Ohio St., 414; *Thompson v. Massie*, 41 Ohio St., 307; *Franklin v. Baker, Extr.*, 48 Ohio St., 296; *Carlile v. Lamb*, 9 Circ. Dec., 70, 16 O. C. C., 578; *Newman v. King*, 54 Ohio St., 273; *Pigot's Case*, 11 Coke, 26; *Master v. Miller*, 4 Term R., 320; 5 Term R., 367; *Woodworth v. Bank*, 19 Johns., 391; *Davidson v. Cooper*, 11 Mees. & Wells., 778; *Clark v. Blackstock*, Holt N. P., 474; *Ex parte White*, 2 Dec. and Ch., 334; *Bank v. Finney*, 5 Mon., 25; *Pulliam v. Withers*, 8 Dana, 98; *Note to Holes v. Trumper*, 7 Am. Rep., 669; *Fay v. Smith*, 1 Allen, 477; *Draper v. Wood*, 112 Mass., 315; 2 Parsons on Notes and Bills, 556-7.

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Under the settled law of Ohio, the addition of the name of another maker to a joint or joint and several note after it has once been completed in accordance with the intention and agreement of previous signers, avoids the note as to them. *Wallace v. Jewell*, 21 Ohio St., 163; 3 Randolph Com. Paper, Sec. 1744; *Gardiner v. Walsh*, 5 El. and Bl., 83; *Shipp's Adm'r. v. Suggett's Adm'r.*, 9 B. Mon., 5, 7, 8; *Hamilton v. Hooper*, 46 Iowa, 515; *Dickerman v. Miner*, 43 Iowa, 508; *Henry v. Coates*, 17 Ind., 161; Byles on Bills, 3 Am. Ed., p. 371. Story on Promissory Notes, Sec. 408a.

Counsel for defendants in error cite *Brownell v. Winnie*, 29 N. Y., 400, and *McCaughey v. Smith*, 27 N. Y., 39 and 41. These cases are not authority in Ohio. The former case is opposed to *Wallace v. Jewell*, *supra*, in the construction placed on the note in controversy, and is expressly repudiated as authority by the Supreme Court of Ohio.

The conclusion of the New York court is based upon the premise that the note before it is a several note. *McVean v. Scott*, 46 Barb., 380.

The law on the subject in New York state is found in *Chappel v. Spencer*, 23 Barb., 584; *Card v. Miller*, 1 Hun. (N. Y.), 504.

Mahler's name, it is true, was added before final delivery to the bank. The note had been once offered as a completed note, and rejected. Mahler's name was then obtained at the instance of the bank, without Hecker's knowledge, after which the paper was discounted. In some of the cases the alteration has resulted from a change in terms or parties after delivery to the payee. This however is not essential to the release, nor is it necessary that the payee should

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know of the alteration. *Jones v. Bangs*, 40 Ohio St., 139.

It will be conceded that the guaranty of a third party may be endorsed upon or appended to a note without releasing previous parties. This is so because a guaranty is a separate, collateral contract, merely ancillary to the principal contract. A guarantor does not, as Mahler did in this case, force himself into and become a joint party to a contract already completely executed by other parties. The distinction for which we contend will appear from the following: *Deming v. Board of Trustees*, 31 Ohio St., 41; *Tenney v. Prince*, 4 Pick., 385; 26 Mich., 251; *Chitty on Bills*, 1854 Ed., p. 915; *McCaughey v. Smith*, *supra*; *Sullivan v. Rudisill*, 63 Iowa, 158.

Properly speaking, none of the parties were principals. The money was borrowed for and paid to a stock company—the Co-operative Publishing Company. Mahler, if he became surety at all, became co-surety with the five original makers for the real beneficiary, the Co-operative Publishing Company.

Suit might have been brought by the bank for the recovery of the money loaned against the Co-operative Publishing Company as undisclosed principal. *Merchants' Nat'l Bank v. Little, Assignee*, 2 Circ. Dec., 496, 4 O. C. C., 195.

If Hecker was a co-surety with Mahler, the decisions which hold one co-surety released by the signing of the name of another without his consent, apply in his favor.

A material alteration will work a discharge whether it be prejudicial or beneficial to the party asserting the defense. The theory of the law is that the alteration changes the identity of the contract, and hence the release.

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The addition of the name of William Mahler to the note (whether added as a surety or a principal) did materially change the way in which the contract might operate under the laws of Ohio upon the five original makers.

Under the authorities, a change which may affect the question of jurisdiction in case of a suit on the note, is a material alteration. 3 Randolph Com. Paper, Sec. 1744; *Bowers v. Briggs*, 20 Ind., 139.

In Ohio the addition of the name of William Mahler to the note as a joint maker with the other parties, whether added as a surety or a principal, had the effect to render it possible for the payee or any subsequent holder to bring a suit on the note in any county in Ohio in which Mahler might reside or be summoned—whereas previous to his signature the original five signers had the power to restrict the jurisdiction to the courts of counties in which they themselves resided or might be summoned. *McArthur v. Ladd*, 5 Ohio, 514; *Higdon v. Gardner*, 1 Circ. Dec., 519, 2 O. C. C., 340; *Stokes v. Lewis*, 1 Term R., 20; Sections 5031, 5038, Revised Statutes.

Mahler was never requested by Hecker to sign the note as a surety, either expressly or impliedly.

Mahler says he signed as surety, but so far as Hecker is concerned this was a mere statement by Mahler of his own intention in signing, and was incompetent. The testimony shows no contract relation and no privity between them. As between Hecker and Mahler the latter signed and paid the note as a volunteer merely. This being so, the cases are uniform to the effect that after paying the note Mahler could not maintain an action at law against Hecker for the money so paid. *Osborn v. Cunningham*, 4 Dev. & Bat., 423; *Carter v. Black*, 4 Dev.

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& Bat., 425; *Talmage v. Burlingame*, 9 Barr. Pa., 21; 2 Am. L. C., 407.

A surety, though a volunteer, may be subrogated in equity to securities held by the creditor, but this is not the relief sought in this case. *Carter v. Jones*, 5 Iredell (Eq.), 196; 49 Am. Dec., 425, and note.

Mahler, though a stranger to Hecker, was bound to the bank even though Hecker were released. *Hamilton v. Hooper*, 46 Iowa, 515.

When Mahler paid the bank, therefore, he only did what he had voluntarily agreed to do.

If Mahler could maintain a suit at law at all, it was against Kronauge.

The note was entrusted to Kronauge as a complete note to have it discounted. He had no authority to obtain other names, and none is shown. Mechem on Agency, Sec. 276.

The application of this rule to the unauthorized alteration of a complete note by one of two promisors before delivery, and without the knowledge of the other, is expressly denied in *McGrath v. Clark*, 56 N. Y., 34, and *Aetna National Bank v. Winchester*, 43 Conn., 391.

E. H. Kerr and *L. B. McIlhenny*, for defendant in error.

The judgment of the court below should be affirmed and should be for the defendant in error for the following reasons:

Because the undisputed facts show that the defendant in error signed the note as surety. Signing a note as surety is not a material alteration of the note. *Miller v. Finley*, 26 Mich., 249; 27 N. Y., 39; 29 N. Y., 400; *Mersman v. Werges*, 112 U. S., 139; *Deming v. Trustees*, 31 Ohio St., 41.

The case of *Wallace and Park v. Jewell*, 21 Ohio St., 163, does not attempt to hold that the signing of a surety is a material alteration, as appears from the opinion of White, J., p. 172, citing *Ex parte Yates*, 2 De Gex and J., 191. The case of *Wallace and Park v. Jewell*, *supra*, merely holds that the signature of another maker constitutes a material alteration. The testimony shows in this case that the defendant in error did not sign as maker but as surety.

In principle this case is the same as the erasure of the name of a surety, which is held not to be a material alteration. *Huntington v. Finch*, 3 Ohio St., 445.

While he did not agree to become a joint maker he did agree to become responsible to the payee for a default of payment by the makers at maturity. This makes defendant's contract one of conditional guaranty. This is what defendant intended his contract to be and just what he understood it to be. When plaintiffs did not keep their contract defendant kept his and paid the note accordingly.

When a person not a party writes his name in blank on the back of a note at the time of its execution and delivery the *prima facie* presumption is that he is the maker of the note and he may accordingly be treated as a surety. This presumption may be rebutted by parol evidence of a different intention and agreement of the parties. When the design is to give additional surety only, parol evidence tending to limit the liability will be construed to effectuate such intention. He will be treated at least as a conditional guarantor. *Seymour & Co. v. Mickey*, 15 Ohio St., 515.

Endorsement by a stranger is a guaranty. *Champion v. Griffith*, 13 Ohio, 228; *Robinson v. Abell*, 17 Ohio, 36.

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Endorsement before negotiation may be treated as an endorsement and not as a making. *Greenough v. Smead*, 3 Ohio St., 415.

Presumption that endorsement before delivery is a making may be rebutted.

The guaranty of the payment of the debt of another made at the time the debt is contracted and without the knowledge of the principal debtor does not alter his contract as to discharge him from liability. A party has the right to make his own contract. *Deming v. Board*, 31 Ohio St., 41.

The mere endorsement upon a note of a stranger's name in blank is *prima facie* evidence of guaranty.

Signing as surety makes an immaterial alteration; especially is this true where there is no fraud and the liability is not changed. Justice says so. 2 Dan. Neg. Inst., Sec. 1389 and N. 1.

The jury should find whether or not Hecker did not assent to or authorize the addition of another maker or a surety by leaving the note in the hands of Kronauge to get it discounted, and whether or not he did not ratify the action of Kronauge in getting Mahler to sign the note by subsequent acts, etc. *Tiernan v. Fenimore*, 17 Ohio, 545.

The contract between the principal and surety, though it may be inferred from the nature of the surety given the contract is not contained therein nor evidenced thereby, but is a collateral contract usually parol, one which may be shown by any competent or satisfactory evidence. *McKee v. Hamilton*, 33 Ohio St., 7.

Parol evidence of declaration of intentions made at the time of signing before delivery of the paper are part of the *res gestae* admissible to establish an agree-

ment where they do not contradict or vary the rights of prior parties. *Oldham v. Broom*, 28 Ohio St., 41.

The holder might recover on the original cause of action. 2 Dan. Neg. Inst., Secs. 1411-1413.

Presumption is that the alteration was made with an honest motive. *Franklin v. Baker*, 48 Ohio St., 296.

Right of restoration of instrument innocently made is recognized and within the jurisdiction of a court of equity. 2 Dan. Neg. Inst., Sec. 1414; 2 Parsons N. & B., 570; *Shepherd v. Whitstom*, 51 Iowa, 457; 2 Dan. Neg. Inst., Sec. 1415.

Kronauge was an agent of his company—makers coupled with an interest, and his authority to procure indorsers may be inferred from circumstances and subsequent conduct of principal. Dan. Neg. Inst., Sec. 289; *Wilson v. Forder*, 20 Ohio St., 89.

The doctrine that a material alteration beneficial to the holder will vitiate the instrument is founded upon a presumption of fraud, and the alteration to have such effect must be such as to effect some change in the meaning or legal operation of the instrument.

The erasure of the name of a surety on a note by agreement between surety and payee is not such an alteration.

The spirit of decisions is against the release in a case like at bar. 2 Dan. Neg. Inst., Sec. 1389.

The benefit cannot be taken without the burden. *Weeden v. Railway Co.*, 14 Ohio, 563; *Winpenny v. French*, 18 Ohio St., 469; Dan. Neg. Inst., Sec. 322; *Woodward v. Suydam*, 11 Ohio, 360.

Relates back and binds from inception. *Pollock v. Cohen*, 32 Ohio St., 514; *Holland v. Drake*, 29 Ohio St., 441.

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Principal must elect within a reasonable time otherwise he affirms. *Rolling Stock Co. v. Railroad*, 34 Ohio St., 450.

No new consideration is required to support the ratification. *Drakely v. Gregg*, 75 U. S. (8 Wall.), 242; *Brooks v. Hook*, 24 L. T., 34; *Grant v. Bond*, 50 N. H., 129; *Pearsoll v. Chapin*, 44 Pa. St., 17; *Huston v. Railroad Co.*, 21 Ohio St., 235; Brandt on Suretyship, Sec. 334.

Acceptance of the benefit of a loan or of the benefits thereof, though made without authority, has been held sufficient ratification. *Union Gold Mining Co. v. Rocky Mountain Bank*, 96 U. S., 640; *Taylor v. Agricultural Co.*, Ala., 229; *Weeden v. Railway Co.*, 14 Ohio, 563; Dan. Neg. Inst., Sec. 362; *Lorie v. Railway Co.*, 32 Fed. R., 270; *Smith v. Sheeley*, 79 U. S. (12 Wall.), 358; *Frank v. Jenkins*, 22 Ohio St., 597; *Woodward v. Suydam*, 11 Ohio, 360.

Authority of the agent may be inferred from the circumstances of the case. These circumstances, which give rise to the implication, are for the jury to consider. 1 Dan. Neg. Inst., Sec. 289.

Stockholders of a corporation liable for its debts are not its sureties—they are principals. *Hager v. McCullough*, 2 Denio, 119; *Taylor v. Wheel Co.*, 3 Dec. (Re.), 947 (9 Am. Law Rec., 28); *Moss v. McCullough*, 7 Bank (N. Y.), 279; *Morawetz Pri. Corp.*, Sec. 879.

The liability of stockholders under statutes imposing personal liability is not that of guarantors, but it is an original liability. 1 Lawson Rights, Rem. & Pr., Sec. 498; *Green v. Beekman*, 59 Cal., 547; *Corning v. McCullough*, 49 Am. Dec., 287; *Moss v. Averill*, 10 N. Y., 459; *Jones v. Barlow*, 62 N. Y., 210; *Wiles v. Suydam*, 64 N. Y., 176; *Chase v. Ford*, 77 N.

H., 33. Extension of time does not release stockholders. *Taylor v. Wheel Co.*, 6 Dec. (Re.), 947 (9 Amr. L. Rec., 28).

DAVIS, J. It has been settled, in this state, that a promissory note in the form of the one involved in this case is joint and several; and that after the delivery of a joint and several note the addition of the name of a third person, as maker, with the privity of the holder, but without the consent of the original signers, vitiates the note as to the latter; but that it is otherwise, if the new party, through inadvertence or mistake, signed so as, *prima facie*, to indicate that his name was added in the character of maker, when in fact such was not the intention. *Wallace et al. v. Jewell*, 21 Ohio St., 163. In the opinion in the case cited, White, J., says: "If the object had been to guaranty payment, or to furnish additional security, otherwise than by becoming or assuming to become a joint maker, there could be no objection to the accomplishment of such object. The new agreement in such case, would be a collateral one, and it would leave the integrity of the original note unaffected. Nor do we suppose the case would be altered, if, in giving such security, the new party should, by mistake or inadvertence, sign the note in such way as to indicate, *prima facie*, that he was an original promissor, the real intention being otherwise. Such a case would fall within the principle decided in *Ex parte Yates*, 2 De Gex and J., 191."

In the present case it was competent for the plaintiff below to show, and he did show, that as between him and the other signers of the note, he was not a joint maker. He testified, and it is not disputed, that he "signed the note for the five to get the money out

of the bank"—"for security for them five." It is conceded that the money which was obtained on the discount of the note went to the benefit of the Co-operative Publishing Company; but that company was in no sense a party to the note and in no way connected with the transaction of obtaining the money. That was the act of the five original signers of the note who had already signed it, and, through the agency of William C. Mahler and Kronauge, presented it at the bank for discount where it was rejected. The five signers, up to this point, were indisputably principals; for the fact that they intended to apply, and afterwards did apply, the money obtained by discount of the note for the benefit of the publishing company, did not make them sureties. So that the claim that they and the defendant in error were co-sureties of the publishing company is not sustainable. The defendant in error "signed the note for the five to get the money out of the bank,"—"signed as security for them"—and still the note was not accepted by the bank. He then pledged his building association book, which meant that if the note should not be paid at maturity, his funds in the building association should be applied to the payment of it. By his agreement to sign as security for the five original signers and by his pledge of collateral he made himself a guarantor for them, as distinctly as if he had written above his name these words: "For value received I hereby guaranty the payment of this note at maturity," and so the bank treated the paper. The note not being paid at maturity, notice thereof was given to the defendant in error, who paid it out of the building association fund which had been pledged. The case is therefore clearly referable to the exception stated in *Wallace et al. v. Jewell*, 21 Ohio St., 163, and

Deming v. Trustees, 31 Ohio St., 41. The defendant in error was not a joint promissor with the plaintiff in error; but was bound by a separate and collateral agreement. This view of the case eliminates the question of fact whether the name of the defendant in error was written upon the note with the consent of Hecker or any other of the original signers. The original makers were bound to reimburse the defendant in error, whether they were, before the delivery of the note to the bank, without knowledge that the defendant in error had signed it as security or guarantor for them, or whether they had such knowledge. The note was in fact signed by the defendant in error at the request and with the knowledge of Kronauge, the agent of the five original signers, and so was signed at the request and with the knowledge of all. *Qui facit per alium, facit per se*. But in the view which we take of this case that is not essential. The instruction to the jury in respect to knowledge and consent by Hecker was erroneous. The circuit court properly reversed the judgment of the court of common pleas, and, on the facts before it, might have gone further.

Affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR and SHAUCK, JJ., concur.

HUTCHINSON, ASSIGNEE, v. STRAUB ET AL.

Rents accruing in hands of assignee—Go to mortgagee as pledgee, instead of assignor's creditors, when—Filing by building association mortgagee, of answer, etc.—In assignee's sale of land—Not forfeit of stock of member, when.

1. Rents of land accruing after an assignee for the benefit of creditors has taken possession of the assigned property, belong, as between general creditors and a mortgagee, claiming under a mortgage which pledges the rents, issues and profits of the land, to the latter when necessary to fully pay the obligation secured by the mortgage.
2. The filing by a building association, mortgagee, of answer and cross-petition in a proceeding brought by an assignee for authority to sell land, is not such an election to forfeit the stock of the member as will estop the association from claiming fines for non-payment of dues accruing after the assignment.

(Decided April 16, 1901.)

ERROR to the Circuit Court of Warren county.

The plaintiff is the assignee for the benefit of creditors of Katie M. Straub, insolvent. The principal defendant in error is The St. Bernard Loan and Building Association Company. The controversy had its origin in the probate court of Warren, by the filing by the assignee of a petition to sell lands, to which the company, as mortgagee, was made defendant and answered. A sale was ordered, the land sold and an order of distribution entered. From this judgment and order appeal was taken by the assignee to the court of common pleas where a like judgment and decree was entered. Error was prosecuted by the assignee to the circuit court where the judgment of the common pleas was affirmed, and the assignee brings error. Further facts are stated in the opinion.

Frank Brandon and George A. Burr, for plaintiff in error.

Gorman & Thompson, for defendants in error.

SPEAR, J. It is conceded that the mortgage of the assignor and her husband to the Company is a valid lien and is the first lien. The question is simply one of amount. The controversy centres about the claim of the Company for rents of the property accruing and received by the assignee after the assignment and prior to the sale, and to fines for non-payment of dues and premium up to the date of the sale. From the record it appears that the mortgage is of the usual building association form. It contains the following provision, viz.:

"Katie M. Straub and John W. Straub, in consideration of three thousand, five hundred dollars, the value of seven shares of its capital stock to them paid by the St. Bernard Loan & Building Association Company, a corporation under the laws of Ohio, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the said The St. Bernard Loan & Building Association Company, its successors and assigns the following real estate, viz.: (description of property same as in petition) and all estate, right, title and interest of the said Katie M. Straub and John W. Straub, either in law or in equity, of, in and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof. Provided, nevertheless, that if said Katie M. Straub, who has become a member of said Company, and has subscribed for — share therein, to be paid in weekly installments of fifty cents per share, and has received in advance from said Company, said sum of three

thousand, five hundred dollars, the value of said shares, shall pay or cause to be paid to the said The St. Bernard Loan and Building Association Company, according to its constitution and by-laws, and without demand therefor, the following sums of money from the date hereof, until such time as the dues paid in, together with dividends credited, shall amount to said sum of thirty-five hundred dollars, in the following manner:" Then follow stipulations for payment of weekly dues, for interest on the loan payable weekly, for premiums on the shares payable weekly, and payment of fines, assessments and penalties incurred or levied in accordance with the constitution and by-laws.

It was held by the court below that the rents collected by the assignee should be paid, so far as necessary to satisfy it, upon the mortgage, and that the Company was also entitled to collect fines to the day of sale, and these conclusions are assigned as error.

1. As to the rents the contention is based upon the proposition that the mortgagee's interest is personal merely, the mortgagor remaining the real owner of the property and entitled to possession subject only to the mortgagee's right to foreclose, and hence the mortgagee is not entitled to rents and profits until he has taken actual possession himself, or constructive possession by a receiver, and an assignee is not such receiver; that the Company's case is not helped by the fact that the mortgage included the rents as well as the land because the assignment carried the right to rents to the assignee for the benefit of general creditors, and the only way the Company could have reached the rents was by the commencement of a foreclosure suit, and the appointment of a receiver, and that it could not do after the assignment since the

probate court acquired exclusive jurisdiction over the land.

The contention is plausible, but we think it is not sound. To assume that the assignment carries to the assignee the right to future rents as against the mortgagee is to take for granted the very matter in controversy. It is to ignore an essential, and, as we think, a controlling condition of the mortgage, viz.: the pledge of the rents, issues and profits. True it is, that, ordinarily, the mortgagor has the right to receive as his own the rents of the real estate so long as he remains in possession. But the mortgagor in this case yielded possession to one who took the property burdened with the duty to administer it for the benefit of creditors, and then the question ceased to be one between the mortgagor and the mortgagee exclusively, and became a question between creditors themselves. The question then is who, among the creditors, has the first right? Those who have general claims only or one who has not only a general claim but a specific lien upon the thing assigned, and upon whatever issues out of it? Manifestly in equity the mortgagee had the right, by virtue of the stipulations in the mortgage, to sequester the rents, and the only question remaining is as to the manner of enforcing such right. Ordinarily the method would be by the appointment of a receiver auxiliary to a foreclosure suit. But why should that be held to be the only way? That holding would make it impossible for the mortgagee to avail himself of his right, for the estate having passed into the exclusive jurisdiction of the probate court, no other court could interfere with the probate court's control of the property, and the effect would be to put it in the power of the debtor to defeat, by assignment of his property, the enforce-

ment of a just and legal lien upon it. That a debtor possesses no such right is elementary.

We think it clear that the right of the mortgagee to proceed against the land for the satisfaction of his mortgage was transferred to the fund arising out of the land, whether from the rents or the sale, or both, and the fund being thus in the custody of the court its distribution should be determined on equitable principles. Nor can it make any difference that the fund was acquired through the process of assignment rather than by the appointment and action of a receiver, for, to all intents and purposes obtaining in the present case, there is no essential difference between the two. Each is an arm of the court for the purpose of working out the rights, equitable as well as legal, of the parties. And the mortgagee having the right to resort to the rents as well as to the land itself for the satisfaction of its debt, a refusal to make such application of the fund would have been a denial of that right. There is no error in this particular. *Bausman & Herr's App.*, 90 Pa. St., 178; *Wolf's App.*, 106 Pa. St., 545; *First Nat'l Bank v. Ill. Steel Co.*, 72 Ill. App., 640.

2. As to the matter of fines, the claim of the plaintiff in error is that the right to them terminated with the assignment; that the effort now is in effect to collect of the assignee; and that, when the Company filed its cross-petition, it elected to forfeit the stock for non-payment and declare the debt due, which action terminated Mrs. Straub's membership in the Company, and she was no longer obliged to pay dues, and that obligation having terminated, the obligation to pay fines was at an end.

This proposition also assumes that the mortgagor could relieve herself of the obligations imposed by

her contract by an assignment. It is not tenable. The assignment could have no such consequence. And, whatever might have been the effect upon the contract of the commencement by the Company of a foreclosure suit, had it resorted to such action, we are of opinion that the filing of its answer and cross-petition did not impair its right to fines, at least to the date of sale, the sale having been ordered prior to the decree finding the amount due the mortgagee. It did not seek the forum, but became a party *in invitum*, and could not do less than assert its claim when thus brought in. Otherwise its rights would have been lost. See *Hagerman v. Ohio B. & N. Assn.*, 25 Ohio St., 186.

Judgment affirmed.

MINSHALL, C. J., and BURKET, DAVIS and SHAUCK, JJ., concur.

WILLIAMS, J., concurs in the judgment as to rents only.

THE STATE OF OHIO EX REL. v. MATTHEWS, SUPERINTENDENT OF INSURANCE.

Securities deposited by insurance company with Superintendent of Insurance—In trust to protect policy holders—Can only be recovered by assignee of company, when—Duty of insurance superintendent in distributing such deposit.

1. Where securities have been deposited with the Superintendent of Insurance, by an insurance company, to be held by such superintendent in trust for the benefit and protection of, and as security for, the policy holders of such company, the assignee of such company, under our insolvent laws, cannot recover such securities from such superintendent without first showing that such company is no longer liable to any of its policy holders.
2. It is the official duty of such superintendent, in the event that such company becomes insolvent, to act, and perform his trust, by distributing the funds so deposited with him, *pro rata* among the several policy holders, and when their just claims shall all be satisfied, to pay the balance, if any, to the company, or its assignee or other successor.

(Decided April 16, 1901.)

PETITION in Mandamus.

The Cincinnati Life Association doing a life insurance business on the assessment plan, deposited securities to the amount of \$5,000.00, with the superintendent of insurance of this state under section 3631—25, Bates' Revised Statutes.

The association having become insolvent, made a general assignment of its assets for the benefit of all its creditors, and thereupon the assignee applied to the court of insolvency of Hamilton county for an order requiring the superintendent of insurance to turn over the \$5,000.00 of securities to such assignee, to be by him distributed among the policy holders *pro rata* according to the amount due to each one,

there being no other kind of indebtedness. The court granted the order as prayed for by the assignee, but the superintendent of insurance was not made a party, and he refused to obey the order, and refused to turn over the securities upon demand of the assignee. Thereupon the assignee caused a petition in mandamus in due form to be filed by the state upon his relation, to compel the superintendent of insurance to turn over the said securities to the assignee. The superintendent of insurance demurred to the petition, on the ground that it does not state facts sufficient to constitute a cause of action against him.

Robertson & Buchwalter, for plaintiff.

J. M. Sheets, attorney general, and *J. E. Todd*, assistant attorney general, and *S. W. Bennett*, for defendant.

BURKET, J. The statute under which the securities were deposited with the superintendent of insurance provides: "The securities deposited with the insurance department pursuant to this section shall be held by the superintendent in trust for the benefit and protection of and as security for the policy holders of such corporation, their legal representatives and beneficiaries."

There is no provision in this statute for turning the securities over to an assignee or receiver in case of insolvency. On the contrary the securities are required to be held by the superintendent in trust for the benefit and protection of, and as security for, the policy holders. This evidently means that the policy holders are to be protected and secured by the superintendent himself, and not through an assignee or receiver. The duty of the superintendent to secure and protect the

policy holders in their rights is, by this statute, made a part of his official duties, and he must discharge that duty himself, and cannot shift it upon an assignee or receiver. The appointment of an assignee or receiver by a court cannot have the effect to relieve the superintendent of insurance of a part of his official duties. He is a trustee of the securities for the policy holders, and as such trustee obtained possession of the fund, and holds the same in his official trust capacity, and the appointment of an assignee—another trustee—cannot authorize such later appointee to compel the earlier trustee to surrender such trust fund. The trust adheres to the office of the superintendent of insurance, and its proper administration is a part of the official duties of the office, made so by the general assembly, and a court cannot change those duties, and relieve the superintendent of duties which the general assembly has imposed upon him. The following cases are more or less in point: *Ruggles v. Chapman*, 59 N.Y., 163, and 64 N.Y., 557; *Cooke v. Warner*, 56 Conn., 234; *Beach on Insurance*, Sec. 82; *Joyce on Insurance*, Sec. 3593.

The assignee stands in the shoes of the company, the assignor, and has the powers only of the assignor as to the collection of outstanding funds. And it is perfectly clear that the assignor, the insurance company, could not recover the securities in question from the superintendent of insurance without first showing that all its policies had been taken up, and that it was no longer liable to any policy holder. So with the assignee, he must first show that the company is no longer liable to any policy holder before he can recover the securities from the superintendent of insurance. As was said by the court in *Falkenbach v. Patterson*, 43 Ohio St., 359, on page 369: "The

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superintendent of insurance should act and perform his trust, * * * and when the trust is fully performed the remainder of the deposit, if any, should be properly disposed of;" that is, it should then, and not till then, be paid over to the assignee.

We think it clear that the assignee is not entitled to the securities held by the superintendent of insurance, upon the facts disclosed in the petition, and the demurrer to the petition will therefore be sustained and the writ refused.

Writ refused.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, J.J., concurred.

OIL WELL SUPPLY COMPANY v. KOEN ET AL.

Plea of former recovery—Not available as bar to action, where court was without jurisdiction—Action to enforce collection of debt—By attachment of property of non-resident—Judgments in rem and in personam—Section 5555, Rev. Stat.—Proceedings after judgment for plaintiff—Attached property not enough to satisfy judgment—Section 5555, Rev. Stat.—Service by publication.

1. A plea of former recovery on the demand in suit, is not available as a bar to the action, where the court was without jurisdiction to render the judgment.
2. An action to enforce the collection of a debt by attachment of the property of a non-resident of this state who has not been summoned nor entered his appearance, is essentially a proceeding *in rem*; and the judgment rendered therein can have no effect beyond the appropriation of the attached property to the satisfaction of the debt and costs.
3. In such action no valid judgment *in personam* can be rendered, on which an execution can issue for the collection of any balance remaining unpaid on the debt after exhaust-

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ing the attached property, nor which can operate as a bar to a subsequent suit for the collection of such balance, although service was made by publication in conformity with the statute.

4. The provision of section 5555, of the Revised Statutes, that "if there be not enough" (of the attached property) "to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue, in all respects as in other cases," cannot, consistently with constitutional guaranties, have application to cases where the defendant in attachment is a resident of another state, over whom the court has obtained no jurisdiction otherwise than by publication of notice according to the statute.
5. A judgment in such case acquires no additional force from the provisions of section 5355, of the Revised Statutes, which authorize a party upon whom service has been made by publication to have the judgment opened up, nor from his failure to pursue that remedy.

(Decided April 16, 1901.)

ERROR to the Circuit Court of Monroe county.

Action on account for goods sold. Plea of former recovery. Reply that the judgment was against a non-resident of the state, on constructive service only. Demurrer to reply sustained, and action dismissed. Reversed.

The action below was brought in the court of common pleas of Monroe county, by the Oil Well Supply Company against O. N. Koen and Charles Barrows, on an account for merchandise sold and delivered by the plaintiff to the defendants, amounting to the sum of \$1,574.51. The defendant Koen alone answered, pleading in bar of the action, a former recovery on the same cause of action, in the court of common pleas of Washington county. The plaintiff replied that, when the former action was brought, the defendant Koen was a non-resident of this state, and on that

ground a writ of attachment was issued in the action, under which certain chattel property of the defendant then in the jurisdiction of the court was attached, and afterward sold, and the proceeds, amounting to the sum of \$714, was applied, by order of the court, on the costs, which amounted to \$49.50, and the balance of \$664.50 was paid on the plaintiff's claim; which last amount the plaintiff admits should be credited on the account sued on in this case. The reply also avers that "no summons was served on the defendant in said action, nor did he appear therein, nor was jurisdiction over the person of said defendant otherwise acquired therein;" but, "service by publication of notice to said defendant was duly made according to law, under clause 3, of section 5048, of the Revised Statutes." A general demurrer was sustained to the reply, the petition dismissed, and judgment rendered against the plaintiff for costs; and from the affirmance of that judgment by the circuit court, error is prosecuted to this court.

Newell K. Kennon and *John C. Nichols*, for plaintiff in error.

It seems that there is no case decisive of this question reported in our Ohio reports, but in the case of *Leonard v. Lederer*, 8 Dec., 711, 10 W. L. B., 450, error to the district court of Cuyahoga county, decided by this court, this question was presented and the court held with the plaintiff in error herein.

(Mr. Kennon then proceeds to give in full the unpublished opinion of Judge Okey in the case of *Leonard v. Lederer*. We give the citations from that opinion.—E. O. R. Reporter.)

Voorhees v. Bank U. S., 35 U. S. (10 Pet.), 449; *Cooper v. Reynolds*, 77 U. S. (10 Wall.), 308; 3 Bl.

Com. Chs., 18; *Crawford v. Chapman*, 17 Ohio, 449; *Drake v. Rogers*, 13 Ohio St., 21; *Murray v. Hoboken L. & I. Co.*, 59 U. S. (18 How.), 272; *Davidson v. New Orleans*, 96 U. S., 97; *Cooley's Con. L.* (5th Ed.), 431; 1 *Swan & Cr.*, 779; 3 *Curwen*, 2061; 75 O. L., 718; *Rev. Stat.*, Sec. 6507; 2 *Swan & C.*, 1010; 3 *Curwen*, 1972; *Rev. Stats.*, 5555; 2 *Chas.*, 1324; *D'Arcy v. Ketchum*, 52 U. S. (11 How.), 165; *Webster v. Reid*, *Ib.*, 437; *Cooper v. Reynolds*, 77 U. S. (10 Wall.), 308; *Maxwell v. Stewart*, 89 U. S. (22 Wall.), 77; *Pennoyer v. Neff*, 95 U. S., 714; *Brooklyn v. Insurance Co.*, 99 U. S., 362; *Empire v. Darlington*, 101 U. S., 87; *Pana v. Bowler*, 107 U. S., 529; and see *Cooley's Con. L.* (5th Ed.), 498; *Drake on Attach.*, Sec. 5449a; *Smith v. Griffin*, 59 Iowa, 409; *Armstrong v. Harvey*, 11 Ohio St., 527; *Skinner v. Moore*, 3 Dev. & Bat., 138; *Loan Association v. Topeka*, 87 U. S. (20 Wall.), 655; *Weyer v. Zanes*, 3 Ohio, 305; *Adams v. Jeffries*, 12 Ohio, 253; *McRae v. Mattoon*, 13 Pick., 53; *Cooley's Con. L.* (5th Ed.), 498; *Pemberton on Judgments*, 4, 5; *Dan. Ch. P.*, Ch., 8; 3 *Pomeroy's Eq.*, Secs. 1345, 1362, 1398; *Freeman on Ex.*, Ch., 29; 3 *Wait's Act. & Def.*, 758; *Gifford v. Morrison*, 37 Ohio St., 502.

Mr. Nichols, in his brief, cited the following:

Pelton v. Platner, 13 Ohio, 209; *Wood & Pond v. Stanberry*, 21 Ohio St., 142; *Arndt v. Arndt*, 15 Ohio, 33; *Cooper v. Reynolds*, 77 U. S. (10 Wall.), 308; *Freeman v. Alderson*, 119 U. S., 185; *Sugg v. Thornton*, 132 U. S., 524; *Bartlet v. Spicer*, 79 N. Y., 78; *McKinney v. Collins*, 88 N. Y., 216; *Needham v. Thayer*, 147 Mass., 536; *Elliott v. McCormick*, 144 Mass., 10; *Martin v. Kittredge*, 144 Mass., 13; *Shumway v. Stillman*, 6 Wend., 447; *Kenney v. Georgen*,

36 Minn., 190; *Downer v. Shaw*, 22 N. H., 277; *Morse v. Presby*, 25 N. H., 299; *Galpin v. Page*, 85 U. S. (18 Wall.), 350; *Rubber Company v. Goodyear*, 76 U. S. (9 Wall.), 807; *Bischoff v. Wethered*, 76 U. S. (9 Wall.), 812; *Barber v. Morris*, 37 Minn., 194; *Heffner v. Gunz*, 29 Minn., 108; *Cleland v. Tavannier*, 11 Minn., 194; *Bell v. Olmstead*, 18 Wis., 75; *Jarvis v. Barrett*, 14 Wis., 591; *Morgan v. Avery*, 7 Barb., 656; *Picquet v. Swan*, 5 Mason, 35; *Harding v. Alden*, 9 Me., 140; *Price v. Hickok*, 39 Vt., 392; *Gibbs v. Insurance Company*, 63 N. Y., 114; *Drake on Attachment*, 7th Ed., Sec. 5; 12 Enc. Pl. and Pr., pp. 143-144, and authorities there cited.

Pearson & Okey, for defendant in error.

If said Washington county judgment is not absolutely void, then the courts below did not err in sustaining the demurrer.

If the common pleas court of Washington county, had jurisdiction or power to render the judgment, then the same is not void. No question can be made in this case as to the regularity of the proceedings of that court. If it had jurisdiction of the subject matter or of the defendant, then the judgment is not void and the demurrer to the reply was properly sustained.

Service by publication is authorized by section 5048, Revised Statutes of Ohio.

The action in Washington county, on which said judgment was obtained, was for the recovery of money and jurisdiction of the defendant may be acquired by service by publication, when the action is brought against a non-resident of the state having property in this state sought to be taken by process

of attachment. *Bank v. Railway Company*, 21 Ohio St., 221; Sections 5560, 5555 and 5355, Rev. Stat.

No attempt has been made by either of said defendants in error to open said Washington county judgment, but the same still stands in full force and effect. *Pelton v. Platner*, 13 Ohio, 209.

The court acquires jurisdiction in attachment, by the issuing of process, predicated upon the requisite affidavit and the attaching of the property; and if, after thus obtaining jurisdiction, the court proceed to render judgment, without the publication of notice, such judgment is not void, and cannot be impeached collaterally. *Paine v. Mooreland*, 15 Ohio, 436.

See dissenting opinion rendered by Judge Thurman, in *Moore v. Starks*, 1 Ohio St., 369.

If, as we think, the court had jurisdiction, the Washington county judgment is not void although the court may have exercised its power or jurisdiction wrongfully or irregularly. "The distinction is between the lack of power or want of jurisdiction in the court, and a wrongful or defective execution of powers. In the first instance all acts of the court not having jurisdiction or power are void, in the latter voidable only. A court, then, may act: 1. Without power or jurisdiction. 2. Having power or jurisdiction, may exercise it wrongfully; or, 3. Irregularly. In the first instance, the act or judgment of the court is wholly void, and is as though it had not been done; the second is wrong, and must be reversed upon error; the third is irregular, and must be corrected by motion."

We know of no case decided by the Supreme Court of this state, or of the United States, in which it was held that such judgment as was rendered by the court

of common pleas of Washington county, against the defendants in error, is void.

It will be observed that there is no kind of claim made here that the judgment in Washington county is void as to the defendant in error Barrows, or that he was not duly served with summons, and yet plaintiff in error seeks by this action to obtain a judgment in Monroe county common pleas court against said defendant in error—Barrows—for the same cause of action as that for which it already has a judgment in Washington county.

We think the common pleas court in Washington county had jurisdiction or power to render the judgment which it rendered against both defendants, that said judgment is still in full force and effect, and must so remain, until said defendants seek to set it aside or have it reversed, and this they can only do, by virtue of section 5355, Revised Statutes of Ohio, and in the mode therein prescribed.

WILLIAMS, J. If the court in Washington county had jurisdiction to render the judgment set up in the answer, this action, obviously cannot be maintained. It is fundamental that a valid judgment rendered on a demand establishes it in the most authentic form known to the law, and the demand so merged in the judgment cannot be made the basis of another action between the same parties; thereafter the judgment is a new debt of a higher nature which may itself be the foundation of an action. But it is equally clear that the judgment, to have that effect, must be one rendered by a court having jurisdiction of the parties, as well as of the subject matter; and if the court was without such jurisdiction, its judgment is as unavailing as a defense to a suit on the original demand, as

it would be in support of an action founded on the judgment. The demurrer to the reply admits that in the former action no summons was served on the defendant, who, during its pendency, was a non-resident of this state, and that no jurisdiction was obtained by the court otherwise than by the seizure of his property on the attachment, and service by publication as authorized in such cases. Jurisdiction, upon such service, to subject property within the reach of the court's process to the satisfaction of the debts of its non-resident owner, is not questioned, nor is the power of the state to confer such jurisdiction on its courts. But a proceeding of that nature is essentially one *in rem*, and the jurisdiction is acquired only where property of the defendant is brought within the control of the court, and is exhausted by the appropriation of the property on the plaintiff's demand. The judgment rendered as the basis for the distribution of the attached property to its payment will not support an execution against other property of the defendant for the collection of any balance then remaining unpaid. There is an entire lack of power in the court to render a valid judgment *in personam* against a resident of another state, who has neither been summoned nor voluntarily entered his appearance. Constructive service has no further effect than to give regularity to the proceedings for the proper application of the attached property. This was substantially held in *Pelton v. Platner*, 13 Ohio, 209; and the principle has been repeatedly maintained by the Supreme Court of the United States. The extent of the court's jurisdiction in such cases, is clearly defined by Mr. Justice Field in *Freeman v. Alderson*, 119 U. S., 188, as follows: "The state has jurisdiction over property within its limits owned by non-residents, and may,

therefore, subject it to the payment of demands against them of its own citizens. It is only in virtue of its jurisdiction over the property, as we said on a former occasion, that its tribunals can inquire into the non-resident's obligation to its own citizens; and the inquiry can then proceed only so far as may be necessary for the disposition of the property. If the non-resident possesses no property in the state, there is nothing upon which its tribunals can act. *Pennoyer v. Neff*, 95 U. S., 714, 723. They cannot determine the validity of any demand beyond that which is satisfied by the property. For any further adjudication, the defendant must be personally served with citation or voluntarily appear in the action. The laws of the state have no operation outside of its territory, except so far as may be allowed by comity; its tribunals cannot send their citation beyond its limits and require parties there domiciled to respond to proceedings against them; and publication of citation within the state cannot create any greater obligation upon them to appear. *Ib.*, page 727. So, necessarily, such tribunals can have no jurisdiction to pass upon the obligations of non-residents, except to the extent and for the purpose mentioned."

And in *Cooper v. Reynolds*, 10 Wall., 308, where it became necessary to declare the effect of a personal action against an absent party without the jurisdiction of the court, and not served with process or voluntarily appearing in the action, and whose property was attached, and sought to be subjected to the payment of the demand of the resident plaintiff, Mr. Justice Miller, after stating the general purpose of the action, and the inability to serve process upon the defendant, and the provision of law for attaching his property in such cases, said: "If the de-

fendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court." Page 318.

It is sought to establish a different operation for the judgment plead in bar in this case, by an observation of the court in *Pelton v. Platner*, *supra*, and the statutory provision there referred to. That case involved the judgment of a justice of the peace, in at-

tachment, and Wood, J., in the opinion, page 219, remarked that in regard to "such judgments rendered in the common pleas, our statute has made express provision that the judgment shall stand, and execution issue thereon as in other cases." That provision, now contained in section 5555, of the Revised Statutes, is that: "If judgment be rendered for the plaintiff, it shall be satisfied" out of the attached property, which shall be sold by order of the court for that purpose, etc.; and "if there be not enough to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue in all respects as in other cases." This last clause evidently has reference to those cases in which the defendant has been served with summons or appeared in the action, and in which, therefore, a personal judgment is properly rendered against him. Many, if not a majority of cases under our attachment laws are of that nature, and to them this provision of the statute may have full and proper application. But to extend its application to cases against non-residents of the state who have not been summoned or appeared, though its language be broad enough to admit of that construction, would bring it into conflict with the constitutional guaranty of due process of law. *Pennoyer v. Neff*, 95 U. S., 714; *Freeman v. Alderson*, *supra*; *Kingsborough v. Tousley*, 56 Ohio St., 450, 459.

For a like reason a personal judgment in such cases derives no force, as counsel seem to contend, from the provision of section 5355, of the Revised Statutes, which authorizes a party against whom a judgment has been rendered without other service than by publication in a newspaper, to have it opened up and be let in to defend, on his application within a specified time. That remedy is available when the proceedings

are regular and the judgment is one which the court had jurisdiction to render; and could be pursued to obtain the vacation of the judgment appropriating the attached property to the satisfaction of the plaintiff's demand. But neither the remedy, nor the failure to pursue it, can supply the want of jurisdiction to render a personal judgment on such constructive service.

We are thus brought to the conclusion that, upon the facts appearing in the pleadings, the balance remaining unpaid on the plaintiff's claim after the application of the proceeds of the property attached in the Washington county case, was not merged in the judgment therein rendered, and that judgment is not a bar to the present action.

Judgment reversed.

MINSHALL, C. J., BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

BOARD OF EDUCATION OF HOPEWELL TOWNSHIP, PERRY COUNTY, v. GUY, COUNTY AUDITOR, ET AL.

Levy or collection of tax—Action to enjoin—Can only be by taxpayer.

An action to enjoin the levy or collection of a tax can be maintained only by one who is a taxpayer.

(Decided April 16, 1901.)

ERROR to the Circuit Court of Perry county.

The plaintiff below, the board of education of Hopewell township, Perry county, commenced an action in the common pleas against the auditor and treasurer of the county to enjoin the levy and collection of a tax, levied by the commissioners of the county for school purposes in a newly created joint subdistrict. The questions are presented on a demurrer to the petition which is as follows:

“The said plaintiff says that Hopewell township, in Perry county, Ohio, is a school district duly organized under the laws of this state and the said plaintiff is the board of education thereof. Plaintiff further says that the defendant, Charles C. Guy, is the duly elected, qualified and acting auditor of Perry county, Ohio, and the defendant, William R. Calkins, is the duly elected, qualified and acting treasurer of said Perry county, Ohio. Plaintiff further says that on April 12, 1898, there was filed in the probate court of Perry county, Ohio, a paper called a petition, signed by C. E. Deffenbaugh and nine other persons praying for the establishment of a joint subdistrict, embracing the territory bounded as follows:”

(The description being immaterial is omitted.)

"The plaintiff says: That the description contained in said petition is as above set forth and said petition contains no other or further identification of the territory and no plat thereof was filed therewith. That Madison township in said Perry county is a school district and is four miles from east to west and six miles from north to south, that the said township lies in the northeast corner of said Perry county, that said Hopewell township is a full original surveyed township and adjoins said Madison township on the west side thereof. The plaintiff further says that the above bounded territory embraces a very large tract of territory in said Madison township; that on the filing of said alleged petition in said probate court said court appointed three commissioners to act in said pretended proceeding to establish a joint subdistrict and fixed a time and place for them to meet and published a notice thereof in two newspapers of opposite politics published at New Lexington in said county. That said commissioners at the time, which was June 1, 1898, and the place (which was said C. E. Deffenbaugh's home) met and attempted to and went through the formality of establishing a joint subdistrict and made a report to said court in writing, that they had established a joint subdistrict and gave in their report the same lines and description above set forth, copying the same identically from said alleged petition. That said commissioners occupied, and say they were four days in discharge of said duties, and on the fourth day of June, 1898, filed their report in the said probate court, and said court immediately entered an order on its journal approving and confirming the same, and offered no opportunity for objections or exceptions thereto. The plaintiff further says that there was no proceedings had or

taken before the boards of education interested in said territory, as required by law, prior to the filing of said alleged pretended petition in said probate court. That the clerk of said Madison township had no notice whatever of any proceedings to establish said pretended joint subdistrict and neither had the board of education of said Madison township or any of its members, and did not, nor did any of them act in said pretended proceeding at any time. And no certified copy of the commissioners' report, plat or court's order was ever delivered to the clerk of the board of education of said Madison township. Plaintiff further says that said commissioners say in their report in reference to school-house and site the following:

"We further find and report that there is no suitable school-house within such boundaries, and we designate as a site therefor a piece of ground in the southeast corner of the northwest quarter of section two, Hopewell township, Perry county, Ohio, south of the public road, but as near said road and as near the east line of said quarter section as practical."

"Plaintiff says that the above is all that is said in said report as to school-house or site therefor, or either, and there is no designation therein or thereby of a site whereon to build a school-house if said district was otherwise legally established. Plaintiff further says that said probate court was wholly and entirely without jurisdiction in said proceedings and each and every act done or attempted by it was illegal and void, and further says that by including in a joint subdistrict the territory that it is claimed by said alleged boundaries is embraced therein, belonging to said Hopewell township, it destroys three subdistricts in said township and would afford the chil-

dren of this alleged joint subdistrict no better school facilities than they already have and would put an unnecessary burden of taxation on the people of said township and impair their present school facilities, and schools which are now among the best in the state, and said pretended report of said commissioners is fraudulent and an injustice, fraud and wrong on the schools and people of said township and might and could have been so shown. And for each and all of the above enumerated reasons the said board of education of Hopewell township by the unanimous vote of its members refuse to levy a tax for the building of a school-house or any other purpose for said pretended joint school district.

"The plaintiff further says that thereafter the said C. E. Deffenbaugh and others made application to the board of county commissioners of Perry county, Ohio, to levy a tax upon the people of said Hopewell township and Bowling Green township in Licking county, to build a school-house, employ a teacher, purchase fuel, etc., for said pretended joint sub school district named by them No. 11, and the said board of county commissioners illegally and without jurisdiction or authority of law, and by reason of the aforesaid illegal and void proceedings, made said levy, which is illegal and void, and on June 26, 1899, made the following entry thereof on their journal, to-wit:

" 'ENTRY.

" 'In the matter of the application of C. E. Deffenbaugh et al. for a levy, etc., for joint subdistrict No. 11, Hopewell township, Perry county, Ohio.

" 'This matter came on for hearing on the application of C. E. Deffenbaugh et al. for a levy for joint subdistrict number 11, Hopewell township, Perry

county, Ohio, Bowling Green township, Licking county, Ohio, and the evidence, and after hearing all the evidence we find: That all of the statements and allegations contained in said application are true: That the said joint subdistrict number 11 had properly, regularly and legally established and that the same is under the care, jurisdiction and control of the board of education of Hopewell township, said county and state, and that the said the board of education of Hopewell township, said county and state, did fail and neglect to provide and furnish sufficient school privileges for the youths of school age in said joint subdistrict number 11. Did fail to provide for the continuance of school in said district for at least six months in the said year. Did fail to provide said district an equitable share of school advantages, and did fail and neglect to provide a school-house for said district number 11. Wherefore we find that in order to secure the site heretofore selected and erect a school-house thereon it requires the sum of \$1,500; for a teacher the sum of \$240.00, and \$60.00 for fuel etc., which will be raised by levy of .0018 mills on the taxable property of Hopewell township, Perry county, Ohio, for said township proportion of funds for the support of said joint subdistrict. We further find that said township has a township high school and that the levy made by said board of education with the levy herein made does not exceed the levy authorized by law. Therefore we hereby report said levy for said joint subdistrict at .0018 mills to the county auditor and instruct him to proceed with the same according to law. And the said county auditor is hereby authorized and instructed to notify the Auditor of Licking county, Ohio, that the said board has this day made levy of \$460.00 on the taxable property of

Bowling Green township, Licking county, Ohio, for the support and maintenance of the joint subdistrict No. 11, as said township proportion of the amount of funds to be raised for the support of said joint subdistrict.'

"The said plaintiff further says that the said defendant, Charles C. Guy will, unless restrained by the order of this court proceed to enter the tax levy above set forth upon the tax duplicate of said Hopewell township, and the said William R. Calkins as county treasurer of Perry county will proceed to collect the same unless restrained by the order of this court. Wherefore the plaintiff prays that the said Charles C. Guy, county auditor, be enjoined from placing said levy on the tax duplicate of said Hopewell township, and said William R. Calkins, county treasurer, be enjoined from collecting the same and for all other proper relief in the premises."

The grounds of the demurrer are, 1, that the plaintiff has no legal capacity to sue; 2, defect of parties plaintiff; 3, misjoinder of parties defendant; 4, defect of parties defendant, and, 5, the petition does not state facts sufficient to constitute a cause of action.

The demurrer was sustained; and the plaintiff not desiring to amend, judgment was entered upon the demurrer dismissing the action. On error the judgment was affirmed by the circuit court; and error is prosecuted here for a reversal of the judgment in both courts.

John Ferguson and James E. Johnston, for plaintiff in error.

It was claimed by the defense in the courts below, and will therefore no doubt be claimed here, that the board of education of Hopewell township has no right

to enjoin this levy, or in any case stop or interfere with the collection of the tax and building of a school house in its district, and within its territory.

We ought not to be compelled to combat such fallacy, or to argue in favor of the right of plaintiff in error to maintain this action.

The court will find by referring to Sec. 3971, Rev. Stat., that each board of education is made a body politic and corporate, and as such capable of suing and being sued, contracting and being contracted with, etc.

The statutes also place all schools and school houses in the district in charge of the board of education of such districts and give the board the entire control and management of all schools and school houses in the district.

They also require such board to make all provisions for schools and the education of all school youth within its territory. Sections 4007, 3987, Revised Statutes.

The board of county commissioners in this case is an interloper and their acts and attempts to levy and collect tax and build a school house is no more than if an attempt were made by any other unauthorized board or person to do such an unauthorized and illegal act, and then claim that the plaintiff in error was bound to stand idly by and let them perpetrate their unlawful acts and inflictions on their district, and after it was done claim and require the plaintiff in error contrary to its judgment to maintain and support its illegal and unlawful inflictions.

The mode of establishing joint subdistricts is provided by chapter 5 of Title 3, Rev. Stat., commencing with Sec. 3928.

It will therefore be plainly seen that no such proceedings were had as authorized these electors to appeal to the probate court. The Madison township district clerk, it is alleged, had no notice of the preliminary proceedings. It is also alleged that there were none of the members of the board of education of that district had notice. That this should have been done and the action of said board taken, or its nonaction, was a prerequisite to the electors, right to appeal to the probate court, and without it, that court was wholly and entirely without jurisdiction of the proceeding, and each and every step taken and act done was void, and being void are subject to attack collaterally, and in every other way when the same is attempted to be enforced. It is a void proceeding and has no life or vitality whatever. We have alleged and shown by our petition that these persons had no right to go before the probate court or to proceed in any respect therein whatever. We have shown that that court had no jurisdiction in the case, and that court like all other courts where no jurisdiction is obtained is powerless to act, and any attempted action, however apparently regular, is void.

This question was carefully considered and all the cases in Ohio considered and referred to by this court in the case of *Wehrle v. Wehrle*, 39 Ohio St., 365.

Again, section 3928 requires the commissioners, if there is no school house, etc., to designate a site. In this case, as we have shown, they say that the site shall be south of a public road in a named quarter section, and as near the road and east line as practicable, this is no designation.

Moss v. Board of Education, 58 Ohio St., 354; Am. and Eng. Ency. Law, 643.

Donahue, Spencer & Donahue and J. E. Powell, prosecuting attorney, for defendants in error.

It is a universal principle based in reason and in the policy of all code procedure, that the real party in interest must be the plaintiff in the case. If one be not injured by the grievances complained of, or be not subject to any pecuniary loss thereby, he is not the real party in interest and can plainly bring no action in reference thereto. From these principles it is not only apparent but it is settled as a matter of law, that only a taxpayer, (that is a person who may be compelled to pay a portion of a tax), can enjoin the levy and collection of the tax. High on Injunctions, Sec. 573; *McMahan v. Welch*, 11 Kan., 280; *Center Township v. Hunt*, 16 Kan., 430; *Nunda v. Crustal Lake*, 79 Ill., 311; *State v. McLaughlin*, 15 Kan., 228; *Ewing v. Board of Education*, 72 Mo., 436; *Trustees v. Thoman*, 51 Ohio St., 285; *Weir v. Day*, 35 Ohio St., 143; *Slavin v. Greene*, 4 Dec., 99 (2 N. P., 39); *Webb v. Ohio Gas & Fuel Co.*, 9 Dec. (Re.), 662, 16 W. L. B., 121; *Buning on Behalf of Cincinnati v. Street Railroad*, 1 Circ. Dec., 178, 1 C. C. R., 323; *Moody v. Arthur*, 16 Kan., 419.

It is equally well settled on principle and authority that a pleading is demurrable if it fails to join necessary parties defendant without whose joinder the action can not be legally prosecuted. The petition of plaintiff in error, record pages 9 and 10, avers that a portion of Madison township, Perry county, Ohio, and a portion of Bowling Green township, Licking county, Ohio, were included within the boundaries of the joint sub-school district established by the probate court of Perry county, Ohio, and were parties to said proceeding in said court, the alleged

irregularities of whose orders and judgment are the predicate of this proceeding to enjoin the tax. A portion of the tax levy must necessarily have been for the benefit and use of such portions of Madison and Bowling Green townships, as fell within the boundaries of said joint sub-school district, consequently the boards of education of said Madison and Bowling Green townships were necessary parties to this proceeding, even if the plaintiff had been a person with legal capacity to sue. Section 5849, Revised Statutes; *Atchison, etc., R. R. Co. v. Wilhelm*, 33 Kan., 206; Cooley on Taxation, page 76; 10 Ency. Pl. and Pr., 911.

The probate courts of this state are, in the fullest sense, courts of records. They belong to the class whose records import absolute verity; that are competent to decide on their own jurisdiction, and to exercise it on final judgment, without setting forth the facts and evidence on which it is rendered.

The probate court of Perry county, Ohio, plainly had jurisdiction of the subject matter involved in the proceeding to establish the joint sub-school district named.

It is too late to question the validity of this proceeding in an action of the character of the one at bar, which is purely collateral. The only remedy the plaintiff in error could have had if it was aggrieved, was a proceeding in error to have reversed the holding of the probate court in the original action itself, or to have caused the judgment thereof to have been set aside for fraud. The judgment of the probate court can not be collaterally attacked upon a state of facts such as are averred in the petition of plaintiff in error. *Shroyer v. Richmond*, 16 Ohio St., 455; *Board of Education v. Stuck*, 39 Ohio St., 259; *Eckstein v.*

Board of Education, 4 Circ. Dec., 149, 10 C. C. R., 480; *Lewis v. Laylin*, 46 Ohio St., 663.

The same rule is recognized in proceedings of township trustees in the establishing of ditches. *Haff v. Fuller*, 45 Ohio St., 495; *Mills v. Board of Equalization*, 1 C. S. & C. R., 566.

The fact that a judgment of the probate court cannot be collaterally attacked and made the basis of an action to enjoin the collection of a tax, as is attempted in this proceeding, is too well established to be further questioned in this state. *Sheldon's Lessee v. Newton*, 3 Ohio St., 494; *Heckman v. Adams*, 50 Ohio St., 305; *Slagle v. Entrekin*, 44 Ohio St., 637; *Callen v. Ellison*, 13 Ohio St., 446; *King v. Bell*, 36 Ohio St., 460, *Lindeman v. Ingham*, 36 Ohio St., 1; *Railroad Company v. Belle Centre*, 48 Ohio St., 273; *Brown. Err. v. Reed*, 56 Ohio St., 264; *Knapp v. Thomas*, 39 Ohio St., 377.

It is amply established by the authorities cited that the judgment of the probate court of this state cannot be collaterally attacked in a proceeding analogous to the one at bar. The court had jurisdiction of the subject matter and of the parties, and its judgment is final and conclusive unless reversed on error or set aside for fraud.

MINSHALL, C. J. It appears from the record that the common pleas held that the demurrer was well taken on the ground that the petition does not state facts sufficient to constitute a cause of action, entitling the plaintiff to relief, and overruled it on the other grounds. On error the circuit court simply affirmed the judgment. We are of the opinion that the judgment should be affirmed on the ground that the plaintiff has no right to maintain the action. It

is, true that the board of education is made by statute a body corporate with capacity to sue and be sued; but capacity to sue is one thing, and right to maintain a particular action is another thing. The plaintiff has no right to maintain this action, and the second ground of demurrer is well taken; and might probably have been raised without demurrer. See *Buckingham v. Buckingham*, 36 Ohio St., 68, 78, where it is said: "To warrant a recovery on the petition, it must show a cause of action in the plaintiff. If the petition fails to show such cause of action, the objection is not waived by a failure to demur, or to make the objection by answer." It is said in *High on Injunctions*, section 573: "The governing rule, resting alike upon principle and authority, is that the action to enjoin the collection of a tax should be brought by the taxpayer, whose property and interests are directly affected by the tax which it is sought to enjoin, the same degree of interest being requisite as in all other cases where the extraordinary aid of equity is invoked." A board of education is not a taxpayer; taxes may be levied for its benefit, but it pays none. Section 3973, Revised Statutes. It has then no interest in the subject of the action, nor is it any part of its duty to prosecute it. Thus it is said in *Moody v. Arthur*, 16 Kas., 419: "A township cannot maintain an action to enjoin an illegal tax on individual property; only the individual can maintain such action, each for himself or for himself and others with like interest. There is no law making a public corporation the guardian of private rights." *Trustees v. Thoman et al.*, 51 Ohio St., 285. Here it was held that the trustees of a township cannot sue to recover back taxes paid by its citizens on an illegal levy, the right of action being in the individual tax-

payers; and by a parity of reasoning only a taxpayer can enjoin the collection of an illegal tax.

It is not necessary to consider any of the other grounds, though it may be proper to say that if the suit had been brought by one having the right to maintain it, the demurrer should have been overruled; in other words the petition states a cause of action in favor of a taxpayer; as it appears therefrom that the probate court had not acquired jurisdiction of the matter; and the tax levied by the commissioners was therefore without authority of law. By recurring to the statutes prescribing how joint subdistricts may be formed, (section 3928, *et seq.*) it will be observed that, aside from the mutual action of boards of education, they may be formed by petition to a board of education situate within any part of the territory to be included in the proposed district. If the proceedings had before this board are unsatisfactory "three or more electors of the territory sought to be included therein, may file a petition or remonstrance for or against the same," in the probate court, which, by the aid of a commission to be appointed by it, may establish it or not, as is found best. It is evident that no proceedings can be instituted in the probate court, until after action had before the proper board of education. Such action is a prerequisite to the jurisdiction of the probate court, and where it has been omitted, the action taken by the court is of no force or effect whatever, and may be questioned collaterally or otherwise, as may the judgment of any court rendered without jurisdiction. *Wehrle v. Wehrle*, 39 Ohio St., 365. It is averred in the petition and admitted by the demurrer that no action had been taken before any board of education, prior to the filing of the petition by Deffenbaugh and

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others in the probate court. The court then had no jurisdiction, and its action in the premises was a nullity. But, for the reason before given, the judgment must be affirmed. Neither this court, nor the court below, can render judgment on the merits of a case, in an action where there is in law no party entitled to the relief prayed for.

Affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK,
JJ., concur.

NEWMAN v. DESNOYERS ET AL.

Vacation of judgment—Section 5360, Rev. Stat.—Order for vacation may be erroneous but not void, when.

Although an order for the vacation of a judgment rendered at a former term without adjudging that there is a valid defense to the action in which the judgment was rendered is erroneous in view of the requirement of section 5360, Revised Statutes, it is not void.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

The record before us was made in the circuit court where the case was tried on appeal. It was a suit brought by the defendants in error against Clara Newman et al., to quiet title to certain real estate, being a lot in the city of Cleveland. In her answer and cross-petition Mrs. Newman denied the title of the plaintiffs below and set up a lien by virtue of a mortgage executed to her by one Joseph Desnoyers, June 24, 1894, to secure the payment of his promissory note then executed to her, and she prayed for a

decree of foreclosure upon her mortgage. The record admits that Joseph was the owner of the lot at the time of the execution of her mortgage unless his title was divested by a judgment of the court of common pleas entered on the 13th of November, 1893, in case No. 46212 brought by the plaintiffs below against said Joseph. The record in that case was introduced by the plaintiffs below upon the trial of the present case. From that record it appeared that the plaintiffs below brought suit against Joseph for the specific performance of his promise to convey the lot to them, and that on November 13, 1893, he being in default for answer, a decree in favor of the plaintiffs was entered in accordance with the prayer of their petition; and it was ordered that Joseph should, within sixty days, convey the premises to them by good and sufficient deed. The decree also provided that if he failed to execute such deed the decree should have the force of such conveyance. The deed so ordered was never executed. Thereupon Mrs. Newman introduced the record in case No. 47950 of the same court in which Joseph Desnoyers filed a petition against the plaintiffs in the former case for the vacation of said judgment, alleging that it was obtained by fraud of said plaintiffs, allegations of material fraud being set out in his petition. His petition also alleged facts which, if true, would constitute a meritorious defense to the suit in which they had recovered their judgment against him. To this petition for the vacation of the former judgment these defendants in error answered by denying all of its material averments. On the 30th of March, 1894, the court disposed of the issues so joined by the following entry upon its journal:

"This cause came on to be heard on the pleadings and testimony, the same being duly advanced and on

due consideration the judgment in said cause No. 46212 being *Exilda Desnoyers et al. v. Joseph Desnoyers*, is opened up and modified and the defendant in said cause No. 46212 has leave to plead therein by motion or otherwise by March 31, 1894. To all of which defendant herein excepts. Judgment is rendered against said Joseph Desnoyers for the costs of this action."

Joseph then filed a motion in case No. 46212 asking the court to strike from the petition redundant and irrelevant matter, and to require the plaintiffs to make said petition "more definite and certain" in material respects. This motion was sustained April 12, 1894. Thereafter, no amendment to the petition having been made, Joseph filed a motion asking that the petition be stricken from the files. This motion was overruled, and the plaintiffs were given leave to file an amended petition by a day named by the court. On May 21, 1894, no amended petition having been filed pursuant to such leave, Joseph filed another motion to strike the petition from the files, of which motion the plaintiffs had notice. On May 24, 1894, the court sustained this motion, the following entry being made upon its journal:

"The motion by defendant to strike the petition from the files is heard and granted at the plaintiff's costs, for which judgment is rendered against said plaintiff. Said petition is stricken from the files, to all which ruling and order said plaintiffs except.

On the trial of the present case in the circuit court it was admitted by all the parties that no action was taken in the former case after the order striking the petition from the files. It was also admitted that Mrs. Newman, believing that Joseph was the owner of the lot in controversy, in good faith accepted the

note and mortgage, in consideration of money loaned by her to him. No other evidence was offered on the trial of the present case. The circuit court adjudged that Mrs. Newman's mortgage be cancelled and that the title of the plaintiffs below be quieted.

Fred E. Bruml and Oscar J. Horn, for plaintiff in error.

This decree we contend is erroneous and of no force for the following reasons:

First. Said decree appears to be entered by consent of defendant's counsel as it recites, although the language might be construed to be, that the counsel of the defendant consented only that the defendants should be in default of answer or demurrer, and that the consent of counsel did not extend to the further findings and decree of the court.

Second. That the finding that the plaintiffs were entitled to the specific execution of the contract in their petition described to the amount of two thousand dollars, is of no force, for no specific performance of the contract can be awarded in damages without evidence as to the amount of the damage, which nowhere appears in the decree to have been had.

Third. That the finding that the plaintiffs would be satisfied with the conveyance to them by a deed in fee simple of subplot No. 56, and the decree based thereon that within sixty days the defendant should convey to the plaintiffs said subplot No. 56, by deed of general warranty; and in default thereof that this decree should operate as, and have the full force and effect in law of such conveyance—is clearly void and of no effect, because no such relief is prayed for in the plaintiff's petition, which prays for the conveyance of subplot No. 57, which was then encumbered

by a mortgage of five hundred dollars, while said subplot No. 56 had no encumbrance thereon.

Fourth. The further finding that this decree is made a lien on all the property described in the petition as defendant interest may appear is not such a decree as the court has jurisdiction to render, for if the prior finding is void then this finding as to a lien is also of no force, because a void decree can not be made a lien upon land.

Fifth. That the counsel of defendant had no power to consent to such a decree, that the same is not a confession of judgment, but if it is anything it is a compromise of the rights of the defendant.

3 Am. and Eng. Enc. Law (2 ed.), p. 358.

Upon the point that the decree is invalid it is not responsive to the pleadings. *Spoors v. Coen*, 44 Ohio St., 497; Enc. Law, (1 ed.) p. 882.

A decree can not be based on facts not in issue in the pleadings. *Carneal v. Banks*, 23 U. S. (10 Wheat.), 181; *Gregory v. Powers*, 3 Litt. (Ky.), 399.

The finding of facts should follow the pleadings. *Lipp v. Harbach*. 12 Neb., 371.

Plaintiff's relief is limited by the prayer of the bill. *Ellis v. Sissons*, 96 Ill., 105.

A failure to answer admits the facts alleged in the petition only. *Meux v. Anthony*, 11 Ark., 411; 52 Am. Dec., 274; 47 Ill., 353.

A void judgment is of no effect and this judgment being void because it decrees the transfer of the title of subplot No. 56 when the petition does not ask for it, may be disregarded. See Secs. 17 and 18, Freeman on Judgments.

We call the attention of the court to the petition filed by Joseph Desnoyers in cause No. 47950 and to

the subsequent decree where the court opened up and modified the decree in cause No. 46212.

Section 5358, Rev. Stat., provides that "The proceedings to vacate * * * shall be by petition * * * setting forth * * * the grounds to vacate or modify it, and, if the party applying was a defendant, the defense to the action."

Section 5359, Rev. Stat.—"The court must first try and decide upon the grounds to vacate or modify a judgment before trying or deciding the validity of the defense."

This the court proceeded to do and both sides appeared, went to trial, argued and submitted their case and the court upon due consideration opened up the judgment in 46212 and modified the judgment.

The proceedings conclusively show that the court in fact did find that Joseph Desnoyers had a valid defense to the cause of action, although the journal entry fails to include all that the court did decide.

This motion for a new trial was heard and submitted and overruled.

As Sec. 5 must have been argued to the court, therefore in denying the motion for a new trial, the court again passed on the question of the validity of Joseph Desnoyer's defense to the cause of action in the petition in No. 46212, and again by its action found the issues in his favor.

The court have taken these several steps, complying with all the requirements of the statutes, in No. 47950, gave to Joseph Desnoyers, leave to plead, by motion or otherwise by March 31st in case No. 46212. *Watson v. Paine*, 25 Ohio St., 340; *Evans v. Iles*, 7 Ohio St., 233; *Henry v. Jeans*, 48 Ohio St., 443; section 5314, Rev. Stat., Sec. 5.

We maintain that the action of the court granting the motion to strike from the files was equivalent to a judgment of dismissal without prejudice. Nash on Pleading. (4 ed.), p. 276; *Frazier v. Williams*, 24 Ohio St., 625; construes Secs. 5358-9-60, Rev. Stat.; *Brundage v. Biggs*, 25 Ohio St., 652; *Braden v. Hoffman*, 46 Ohio St., 639.

In our case, however, while the journal entry of opening up and modifying the former decree does not show that the court found that there was a valid defense to the cause of the action, yet the motion for a new trial, which is a part of the record, shows that the court did so find, and therefore the authority above is not conclusive against us, but if anything, in our favor, for it indicates that if the court had found a valid defense and had modified the judgment, its order giving leave to answer would have been correct.

Ralston v. Wells, 49 Ohio St., 298, decides: The proper proceeding to vacate a judgment of a former term is by petition under Sec. 5358, Rev. Stat., and not by motion under Sec. 5357 (p. 301, Sec. 3). If defendant showed ground to vacate, the court should have adjudicated no further than to determine that question, for there still remained to be heard and passed upon the further question whether the right judgment had not, after all, been rendered. The above case is not applicable to ours on the facts, for in our case the plaintiffs have by their own refusal to plead and by submitting to have their case stricken from the files, prevented this court from making a final finding upon the merits of the case; and the question of the validity of our defense has not, and cannot be any further determined, because the plaintiffs re-

fuse to submit their case to the court for determination and refuse to make up an issue.

W. H. Polhamus, for defendants in error.

The court of common pleas had jurisdiction both of the subject of the action, and the parties thereto.

That being so, its decree was binding on parties and privies, until regularly reversed, no matter how irregular or erroneous it may have been; and such errors are not available on collateral attack of the judgment or a title under it.

Bigelow v. Bigelow, 4 Ohio, 138; *Buell v. Cross*, 4 Ohio, 327; *Douglass v. McCoy*, 5 Ohio, 522; *Foster v. Dugan*, 8 Ohio, 87, 107; *Adams v. Jeffries*, 12 Ohio, 253; *Boswell v. Sharp*, 15 Ohio, 447; *Paine v. Mooreland*, 15 Ohio, 435; *Douglass v. Massie*, 16 Ohio, 271; *Cochran v. Loring*, 17 Ohio, 409; *Newman v. Cincinnati*, 18 Ohio, 323; *Reynolds v. Stanbury*, 20 Ohio, 344; *Fowler v. Whiteman*, 2 Ohio St., 270; *Moore v. Robison*, 6 Ohio St., 302; *Trimble v. Longworth*, 13 Ohio St., 431; *Callen v. Ellison*, 13 Ohio St., 446; *Hammond v. Davenport*, 16 Ohio St., 177; *Calkins v. Johnston*, 20 Ohio St., 539; *Spoors v. Coen*, 44 Ohio St., 497.

Decrees in chancery stand on the same footing as judgments at law, in respect to conclusiveness on parties and privies. *Babcock v. Camp*, 12 Ohio St., 11; *Welsh v. Childs*, 17 Ohio St., 319.

Where a court of general jurisdiction is to exercise its powers upon a state of facts to be proved before it, the proof is presumed to have been made, and the existence of the fact cannot be collaterally denied. *Pillsbury v. Dugan*, 9 Ohio St., 117; *Maxsom v. Sawyer*, 12 Ohio St., 195.

The decree was absolute as to the defendants in error when the petition to set aside was filed.

The decree was never reversed. *Hettrick v. Wilson*, 12 Ohio St., 136.

The power of the court to set aside or vacate its judgments, subsequent to the judgment term, is governed by settled principles, to which the action of the court must conform. *Huntington v. Finch*, 3 Ohio St., 445; *Braden v. Hoffman*, 46 Ohio St., 639.

Court journal must show what the court really did. 2 Evans, Poth., 336.

Whether it has been adjudged that there is a valid defense to the action, before setting aside a judgment rendered at a former term of the court, should not be left to mere presumption. *Hettrick v. Wilson*, 12 Ohio St., 136.

In order that the validity of the defense may be adjudged, an issue or issues should be made up by proper pleadings.

If the proceeding to vacate or modify be by motion, the defendant should be required to file his answer to the original petition, with leave to the plaintiff to reply. Was the application in this case by motion? Then defendant should have been required to file his answer. But no answer was filed. If the proceeding be by petition, in which the matters of defense are set forth in issuable form, it would be sufficient, no doubt, to take issue thereon by reply or demurrer. When the issue is thus made up, it should be tried as in other cases. *Watson v. Paine*, 25 Ohio St., 340, *Frazier v. Williams*, 24 Ohio St., 625.

SHAUCK, J. The view urged in support of the judgment of the circuit court is that the decree of the court of common pleas in favor of the defendants

in error in their suit for a specific performance remains in force notwithstanding the subsequent order of the same court for the vacation of that decree. This is said to be so because in its subsequent order for the vacation of that decree the court of common pleas did not expressly adjudge that Joseph Desnoyers had a valid defense to the suit in which that decree was entered. His petition filed for that purpose alleges fraud in the recovery of the judgment whose vacation he sought, as well as a valid defense to the suit in which it was recovered. It appears clear, and it is admitted, that his petition is in accordance with the requirements of section 5358 of the Revised Statutes. The jurisdiction of the court to vacate its judgment rendered at a former term was therefore properly invoked, and the parties in whose favor that judgment had been rendered were before the court upon the petition to vacate. The precise point made by counsel for defendants in error is that the court failed to exercise its jurisdiction in that behalf because its order for the vacation of the judgment did not comply with section 5360 of the Revised Statutes whose material provision is that "a judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment was rendered." In support of the proposition that the adjudication with respect to the existence of such defense is indispensable to the validity of the order of vacation *Hettrick v. Wilson*, 12 Ohio St., 136, 138, and *Braden v. Hoffman*, 46 Ohio St., 639, are cited. Other decisions of this court of like purport with those might have been cited. They were proceedings in error to reverse orders vacating judgments rendered at former terms of the courts in which they were made. The cases establish the doctrine

that an order to vacate a judgment rendered at a former term without the required adjudication with respect to the existence of a valid defense is erroneous, and that such adjudication must affirmatively appear in the record. But none of the cases holds that such order without the required adjudication is void and subject to collateral attack. In the present case the parties joined issue upon the petition to vacate the judgment in their favor and offered evidence in support of their answer. When the order of vacation was entered they acquiesced by not instituting a proceeding for its reversal. They afterward appeared in the original case to contest the motion which was directed against their petition. That motion having been sustained, and another being made to dismiss the petition because of their failure to comply with the order of the court for the amendment of their petition, they contested that; and although excepting to the order sustaining the motion to dismiss, they acquiesced therein. All the issues involved were triable by the court without the intervention of a jury. At every step the court was engaged in the exercise of jurisdiction expressly conferred upon it by statute, and all parties affected by its orders were before it. Notwithstanding the error in the exercise of its jurisdiction, when the court finally dismissed the original petition the original decree was as effectually annulled and the case disposed of as though it had been upon issues of fact joined. No reason appears for holding that the case should be regarded as an exception to the general rule that all judgments and final orders made by courts in the exercise of jurisdiction over the subject matter and jurisdiction of all persons whom they affect are valid until they are reversed. The

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common understanding that orders of vacation, defective as is this, are within that general rule, is indicated by the numerous proceedings instituted for their reversal.

Judgment reversed and judgment for plaintiff in error.

MINSHALL, C. J., WILLIAMS, BURKET and SPEAR, JJ., concur.

DAVIS, J., absent.

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THE WABASH RAILROAD COMPANY v. SKILES.

Railway company liability for accident to passenger or employee—Passengers not held to degree of duty required of employees, when—Employee steps upon railway track from platform—Guilty of contributory negligence, when—Extent of care required of ordinary person in attempting to pass over track—Law of negligence.

1. The rule of law which excuses passengers from the obligation to observe a strict lookout for trains and locomotives when alighting from or getting upon trains over the tracks of a railway company, does not apply to employees whose duties may require them to cross the tracks in the yards or at the depots of the railway.
2. Such employees will be held to the exercise of ordinary care in going from a place of safety upon or across railway tracks; and ordinary care requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a railroad track, should use them for the purpose of discovering and avoiding danger from an approaching train; and an omission to do so, without reasonable excuse therefor, is negligence which will defeat an action by such person to recover damages for an injury to which such negligence contributed.

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3. Where such an employe, without looking or listening, steps upon a railway track from a place of safety on a platform, immediately after the passing of a train, and in front of and close to, a backing switch engine, so that he is immediately struck and injured by such engine, he is guilty of contributory negligence, and cannot recover for the injury thus received.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Williams county.

The defendant in error was the plaintiff below and complained of the defendant, The Wabash Railroad Company, as follows:

1. That defendant is now, and was when the cause of action hereinafter stated arose, a corporation for profit duly organized under and operating under the laws of Ohio as a common carrier of freight and passengers, as a railroad company, and having a station and doing business as such at Montpelier, Williams county, Ohio.

2. That for several months prior thereto and on April 16, 1899, plaintiff was employed in the car department of said defendant corporation, at and about the yards of said company at the village of Montpelier; that the duties of plaintiff, respecting his said employment, were to clean and replenish certain of the dining cars of said defendant company arriving at said station on its passenger trains, and to furnish said cars with coal and water and such other attention and care as might be found necessary; that in said employment plaintiff was at said time under the direction and subject to the orders of a foreman, who had control of the employes of said company at said station who were in said car department; that plaintiff at said time, as compensation for his said serv-

ices, received and was earning and was paid the sum of fifty dollars per month, and was of the age of forty-six years.

3. That on said day the yards and tracks of said defendant company at said station were under the direction and control of a yardmaster whose duties were independent of the duties of said foreman of the employes of said defendant's car department at said station, said yardmaster being charged with the duty of superintending switchmen, and switch engines, and the switching and disposition of trains, engines and cars over and about the tracks of said company at said station; that on said day the position of yardmaster at said station was filled by one Gilbert; that said yardmaster at said time had no control over the duties of plaintiff, the department whereof said yardmaster was then superintendent being entirely distinct and separate from the car department whereto plaintiff belonged; nor had plaintiff any power to direct or control any employes in said car department, or said yardmaster.

4. That on said day, by the rules of said company, and its practice at said station, all westbound passenger trains arriving at said station were held and stationed on the track immediately adjoining to and just south of the passenger platform at the passenger station of said company in said village, said track being known as the Chicago track, while eastbound passenger trains arriving at said station, especially while said Chicago track was occupied by a passenger train, were stationed and held on a track immediately south of and next to said Chicago track known as the Peru track; that then the said defendant company had constructed, and there was, no way or means of access to said Peru track from said pas-

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senger platform save by passing directly over the rails and bed upon the bed of said Chicago track.

5. That on said day it was the especial duty of plaintiff to look after and attend to the wants and needs for coal, water and otherwise of the dining car attached to an eastbound passenger train, which said east train, at the time of the accident and happening hereinafter described, came in upon and was standing on said Peru track, said Chicago track having been prior to the arrival of the said eastbound train and being at the time of its said arrival occupied by a westbound passenger train.

6. That just immediately prior to the happening of the accident hereinafter described plaintiff, by the orders of his said foreman, was upon said passenger platform, with the said westbound train between him and said train on said Peru track whereon was the dining car which was the especial object at that time of plaintiff's duty, that said westbound train was then in motion westward, and that plaintiff, as soon as the last car thereof had cleared the place on said passenger platform whereat plaintiff stood, being obliged to hasten to his duties towards said dining car before said eastbound train should move, passed around the immediate rear of said departing train and upon said Chicago track for the purpose of crossing the same to his said car; that at said time there was in force a rule of said company that the switch engine of said company stationed at the yards of said company at said village and then and there under the direction and control of the yardmaster, should not pass along said Chicago track, as and when said Peru track was occupied by a passenger train, as was the case at that time, unless said engine was preceded by some employe of the company whose duty it was

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to warn all persons off of said track until said engine should have gone by, and unless a warning should be continuously sounded by the bell of said engine; that it was on said day the particular duty of said yardmaster to enforce said rule; that plaintiff did not observe said switch engine but that the same was then noiselessly, rapidly and closely and carelessly following said departing westbound train, advancing backward, and that there was no person preceding said engine, as required by said rule, to warn persons of danger, nor was said engine sounding any alarm by either its whistle or its bell or otherwise; that immediately and without warning of any sort plaintiff was struck by said engine and was crushed and injured as follows, viz.; his right leg was run over and crushed just below the knee, and his left foot was run over and crushed at the instep; that the plaintiff suffered this injury without fault of his own, but wholly through the negligence or default of said defendant company in this and in these particulars, viz.:

7. That said switch engine, the same being under the immediate control and direction of said yardmaster, who was riding thereon, was negligently and carelessly permitted to and did advance backward on said Chicago track, following said departing westbound train, so closely and so carelessly and rapidly and noiselessly as to greatly endanger all persons having lawful business to cross said Chicago track for the purpose of approaching said passenger train on said Peru track, as plaintiff then had to cross said track for the performance of his duties with reference to said dining car; that by the negligence of said defendant company and its said yardmaster then riding thereupon said switch engine was permitted to

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and did follow said departing passenger train backward so closely, noiselessly and rapidly, as aforesaid, but without some one preceding the same to sound the warning of its approach, as required by said rule; and that said switch engine was permitted to and then did carelessly and, by the negligence of said defendant company, noiselessly and rapidly proceed over said Chicago track in the immediate rear of said departing train without sounding a warning of its approach either by bell, or by whistle, or otherwise.

8. Plaintiff says that at the time he stepped upon said track, under the circumstances aforesaid, for the purpose of attending to his duties with reference to said dining car on said Peru track, and at the time said switch engine struck him, as aforesaid, he was exercising care and caution, with full reliance that the way of access to said passenger train on said Peru track would be preserved to the safe passage of passengers and railroad employes having lawful business to cross the same, as plaintiff then had, and that he neither heard nor saw said engine or its approach, and was not aware of its proximity until it was upon him, and that it followed said departing westbound passenger train so rapidly, closely, silently and carelessly that he had neither time nor opportunity to escape it.

9. That as a result of said injuries plaintiff was confined to a hospital for five months, where he was necessarily subjected to two amputations of his said injured right leg, below the knee, and to an amputation of his left foot at the ankle, and he was otherwise painfully treated and operated upon; that as the result of said injuries plaintiff for many months suffered very great bodily pain and distress and does still suffer great pain and distress; and is broken in

health, and has become and is now greatly and permanently crippled; that since receiving said injuries plaintiff has been and is now wholly unable to perform any manual labor.

10. Plaintiff says that he received each of said injuries and suffered said bodily pain and distress, and is now permanently injured and crippled without any fault of his own, but solely through the fault and negligence of said defendant company, in the manner and way above set out, and while plaintiff was in the faithful performance of his duty toward defendant.

Plaintiff says that because of the injuries by him sustained as aforesaid he has been damaged in the sum of twenty-five thousand dollars, for which sum he asks judgment against the defendant, The Wabash Railway Company.

The railroad company answered as follows:

It admits that it is now and was at the time when plaintiff's alleged cause of action arose, a corporation for profit, duly organized under and operating under the laws of Ohio as a common carrier of freight and passengers as a railway company, having a station and doing business as such at Montpelier, Williams county, Ohio.

It admits that for several months prior thereto and on April 16, 1899, the plaintiff was employed in the car department of the defendant at and about the yards of said company in said village of Montpelier; and that the plaintiff's duties respecting his said employment were to clean and replenish certain of the dining cars of said company, arriving at said station on its passenger trains, and to furnish said cars with coal and water and to give the same such other attention as might be needed; and that in said employ-

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ment the plaintiff was, at said time under the direction and subject to the orders of a foreman, who had control of the employes of said company at said station in said car department.

The defendant admits that on said day the yards and tracks of said defendant at said station were under the direction and control of a yardmaster, said yardmaster being charged with the duty of superintending switchmen and the switching and disposition of trains, engines and cars over and about the tracks of said company at said station; and that on said day the position of yardmaster at said station was filled by one Gilbert, and that the plaintiff had no power to direct or control any of the employes in said department, or said yardmaster.

This defendant admits that on said day the track immediately adjoining to and just south of the passenger platform at the passenger station of said company, in said village, known as the Chicago track, was occupied by a certain westbound passenger train; and that immediately south of said track and next thereto, was another track, known as the Peru track, and that it was necessary to cross the said Chicago track to get from the passenger platform of said station to said Peru track.

This defendant admits that on said day it was the special duty of said plaintiff to look after the needs for coal, water and otherwise of a certain dining car attached to an eastbound passenger train, which said train at said time was standing on said Peru track.

This defendant admits that plaintiff stepped on said Chicago track immediately in front of a certain switching engine of the defendant which was proceeding westward thereon a short distance in the rear of the said westbound passenger train, and that said

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plaintiff was struck by said engine and seriously injured and crippled.

This defendant denies all and singular the allegations and averments of said petition not herein expressly admitted to be true.

Further answering, this defendant says that it denies that said plaintiff at the time he stepped upon said Chicago track and was struck by said switching engine was exercising care and caution, but on the contrary alleges that said plaintiff was guilty of negligence directly contributing to his said injuries in stepping on said track immediately in front of said approaching engine, of whose approach he was well advised and knew, or might have known by the exercise of ordinary and reasonable care for his own safety, and in failing to keep a proper and reasonable lookout for his safety at the time he stepped upon said track; and defendant alleges that if the plaintiff was injured in consequence of the negligence of any one, such negligence was that of plaintiff himself, and not of this defendant or any of its officers, servants or employees.

This defendant therefore prays that it may go hence, without day, and recover its costs.

The plaintiff replied, denying each and every averment of the answer which was not an admission of the averments contained in the petition. A jury was impaneled and sworn and the cause proceeded to trial in the court of common pleas, and the plaintiff offered to introduce evidence in support of his petition, but the defendant, by its counsel, and before the introduction of such evidence, interposed an objection to the reception of any testimony for the reason that the petition failed to state facts sufficient to constitute a cause of action against the defendant and

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in favor of the plaintiff, which objection the court sustained and refused to allow the introduction of testimony under said petition in support thereof. An exception was taken, and the plaintiff not asking to plead further, the defendant moved the court for judgment in its favor upon the pleadings, which motion the court granted, dismissed the cause and rendered judgment against the plaintiff for the costs. On proceedings in error in the circuit court the judgment of the common pleas was reversed and the cause was remanded to the court of common pleas for further proceedings and trial. The railroad company prosecutes this proceeding in error to reverse the judgment of the circuit court and to affirm the judgment of the court of common pleas.

Smith & Beckwith, for plaintiff in error, cited the following authorities:

State ex rel. v. Critex, 48 Ohio St., 142; *Headington v. Neff*, 7 Ohio (pt. 1), 229; *Trott v. Sarchett*, 10 Ohio St., 241; *Hillier v. Stewart*, 26 Ohio St., 652; 1 Samuel, 119, n. 7; *Railway Co. v. Elliott*, 28 Ohio St., 340; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St., 66; *Railway Co. v. Crawford*, 24 Ohio St., 631; *Railway Co. v. Depew*, 40 Ohio St., 121; *Elliott v. Railway Co.*, 150 U. S., 245; *Dakota*, 41 N. W. Rep., 758; *Aerkfetz v. Humphreys*, 145 U. S., 418; *Railway Co. v. Houston*, 95 U. S., 697; *Wilber v. Wisconsin Central Co.*, 57 N. W. Rep., 356; *Loring v. Railway Co.*, 31 S. W. Rep. (Mo.), 6; *McCadden v. Abbot*, 66 N. W. Rep., 694; *Tomko v. Railway Co.*, 37 N. Y. Sup., 144; *Gardner v. Railway Co.*, 95 Mich., 240; *Ritzman v. Railway Co.*, 40 Atl. Rep., 975; *Railway Co. v. Pfuellb.*, 37 Atl. Rep., 1100; *Carlston v. Railway Co.*, 129 Mich., 481; *Railway Co. v. Baird*, 94 Fed. Rep., 946;

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Railway Co. v. Moscley, 57 Fed. Rep., 921; *Bailey Personal Injuries*, Secs. 1270 to 1289; *Warner v. Railway Co.*, 168 U. S., 339; *King v. Railway Co.*, 99 Fed. Rep., 251; *Railway Co. v. Freeman*, 174 U. S., 379.

John M. Killitts, for defendant in error, cited the following authorities:

Railroad Co. v. Margrat, 51 Ohio St., 130; *Railway Co. v. Erick*, 51 Ohio St., 146; *Parsons v. Railway Co.*, 113 N. Y., 355; *Snyder v. Railway Co.*, 60 Ohio St., 487; *Railway Co. v. Keary*, 3 Ohio St., 201; *Berea Stone Co. v. Kraft*, 31 Ohio St., 287; *Railway Co. v. Lavalley*, 36 Ohio St., 221; *Railway Co. v. Henderson*, 37 Ohio St., 549; *Dick v. Railway Co.*, 38 Ohio St., 389; *Railway Co. v. Murphy*, 50 Ohio St., 135; *Flike v. Railway Co.*, 53 N. Y., 549; *Corcoran v. Holbrook*, 59 N. Y., 517; *Fuller v. Jewett*, 80 N. Y., 46; *Slater v. Jewett*, 85 N. Y., 61; *Crispin v. Barrett*, 81 N. Y., 516; *Sheehan v. Railway Co.*, 91 N. Y., 332; *Dana v. Railway Co.*, 92 N. Y., 639; *Railroad Co. v. Powers*, 74 Illinois, 341; *Railway Co. v. Kernochan*, 55 Ohio St., 306; *Pantzar v. Mining Co.*, 99 N. Y., 368; *Benzing v. Steinway*, 101 N. Y., 547; *Railroad Co. v. Becker*, 67 Ark., 1; s. c., 46 L. R. A., 814; *Railway Co. v. Culpepper*, 46 S. W. Rep., 922; *Railroad Co. v. Bussey*, 95 Georgia, 584; *Helton v. Railway Co.*, 97 Alabama, 275; *Hall v. Railroad Co.*, 46 Minnesota, 439; *Sobieski v. Railroad Co.*, 41 Minnesota, 169; *Railway Co. v. Crawford*, 24 Ohio St., 631; *Railway Co. v. Fleming*, 30 Ohio St., 480; *Railway Co. v. Picksley*, 24 Ohio St., 654; *Railway Co. v. Depew*, 40 Ohio St., 121; *Railway Co. v. Rathgeb*, 32 Ohio St., 66; *Railway Co. v. Whitacre*, 35 Ohio St., 627; *Beach, Contributory*

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Negligence, Sec. 160, and cases cited; *Parsons v. Railway Co.*, 113 N. Y., 355, 3 L. R. A., 683; *Terry v. Jewett*, 78 N. Y., 338; *Brassell v. Railroad*, 84 N. Y., 241; *Betts v. Railroad*, 191 Pennsylvania, 575, 45 L. R. A., 261; *Murphy v. Railroad Co.*, 88 N. Y., 445; *Betts v. Railway Co.*, 191 Pa., 575; *Railway Co. v. Kernochan*, 55 Ohio St., 306; *Robison v. Gary*, 28 Ohio St., 241; *Kelley v. Howell*, 41 Ohio St., 438; *Gardner v. Railway Co.*, 97 Mich., 240; *Wilbur v. Railway Co.*, 86 Wis., 535; *Keefe v. Railway Co.*, 92 Iowa, 182; *McCadden v. Abbot*, 92 Wis., 551; *Beach Con. Neg.*, Secs. 178-9; *Railway Co. v. Bingham*, 29 Ohio St., 364.

DAVIS, J. Whether the plaintiff has, or has not, the right to recover on the facts alleged in his petition, is a question which was fairly raised by the defendant's objection to the introduction of any testimony in support of the petition, and by the defendant's motion for judgment in its favor, upon the pleadings. In seeking for the proper answer to this question, it may be assumed that the defendant was negligent in closely and rapidly following up the west-bound train with a switch engine, without signals and without any one preceding it to give warning of its approach, as required by the defendant's rule; for the inquiry which is raised by the averments of the petition is not so much whether the defendant was negligent, as whether the plaintiff's own want of ordinary care was the proximate cause of his injury.

There is nothing clearer in the case stated in the petition than that the plaintiff was in a place of safety while he remained on the platform. However great was the negligence of the defendant, it was harmless to the plaintiff while he remained on the

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platform. His act of stepping upon the track immediately in front of the backing engine was the proximate and concurrent cause of his injury. If he did this with the exercise of such care as a person of ordinary prudence would exercise under like circumstances, then he was legally without fault and is entitled to recover. If he stepped upon the track without such care, he brought his injury upon himself and is not entitled to a judgment against the defendant. If he had looked he could have seen the approaching engine, indeed must have seen it, for he avers in his petition that the "westbound train was then in motion westward, and that plaintiff, as soon as the last car thereof had cleared the place on said passenger platform whereat plaintiff stood * * * passed around the immediate rear of said departing train * * * and that *immediately* and without warning of any sort plaintiff was struck by said engine." Yet he avers that "he *neither heard nor saw* said engine or its approach, and was not aware of its proximity until it was upon him, and that it followed said departing west bound passenger train so rapidly, *closely, silently and carelessly that he had neither time nor opportunity to escape it.*" It is inconceivable that a man of ordinary prudence would under such circumstances have failed to look or listen before stepping on the track, so as to have both seen and heard the engine which was so closely following the passing train. To an ordinarily prudent man a railroad track is itself a warning to be alert, to use his senses, to look and listen; and an ordinarily prudent man would not blindfold himself, nor stop his ears, when about to exercise his intention of leaving a place of safety on the platform to cross the track in

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the presence of moving trains. Practically this is just what the plaintiff did do; and he claims that he had the right to close his senses, because he was an employe of the railroad company, and had duties to perform, and was in a hurry. He claims the right to ignore the plainest and most ordinary dictates of prudence, in a full and implicit reliance on the diligence and faithfulness of the other employes of the company in performing their duties. It has been laid down as the law that passengers who are required to cross railroad tracks in getting upon or alighting from trains, have the right, from the nature of their contract, to expect a safe place for that purpose and may govern themselves accordingly; but such immunity has never been conceded to travellers upon a railroad crossing, having equal rights there with the railroad company, and still less to employes in the yards or depots of the company. The latter have no invitation or implied contract, as passengers do have, to perform their duties in a safe place. The very nature of employment about the tracks of a railroad involves notice of the danger of it, and nobody knows better than an employe that other employes are liable to be careless in the observance of rules and lax in the performance of duty. Therefore he cannot be permitted to shut his eyes to obvious dangers, and to act with "full reliance" that rules will be observed, and a safe passage kept for him whenever his duties call upon him to cross the tracks. He cannot be excused from the rule that ordinary prudence requires that a person in the full enjoyment of the faculties of seeing and hearing, should use them when about to pass over a railroad track, and that the omission to do so is contributory negligence when it immediately re-

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sults in an injury which might have been avoided if the injured person had looked or listened. *Railway Co. v. Elliott*, 28 Ohio St., 340; *Railway Co. v. Crawford*, 24 Ohio St., 631. The plaintiff in this case was in a place of safety. He was not bound to go upon the track in front of an advancing engine, even in the urgent performance of his work. In doing so without looking or listening, he was clearly guilty of negligence proximately contributory to his injury. The views which we have here expressed are not only implied in previous decisions of this court, but they have been very plainly defined in the following cases: *Loring v. Kansas City, etc., Railway Co.*, 128 Mo., 349; *Elliott v. Railway Co.*, 150 U. S., 245; *Aerkfetz v. Humphreys*, 145 U. S., 418; *Chattanooga, etc., Railway Co. v. Downs*, 106 Fed. R., 641.

The case of *Snyder v. Railway Company*, 60 Ohio St., 487, does not apply. Snyder was on the track, engaged upon a duty which required him to be there, and could have been seen by the train men in time to have avoided the injury. It was not a case in which the inference of contributory negligence necessarily arose. In this case, the plaintiff was in a place of safety, and in blind reliance upon his assumption that no engine would be following the westbound train and that nobody else would be guilty of negligence, left the safe place and stepped upon the track immediately in front of the backing engine, without looking, and was injured. In this case the inference that the plaintiff was himself negligent and that his negligence directly contributed to his injury is unavoidable. If all the material facts are undisputed, and admit of no rational inference but that of negligence, the question becomes a question of law. *Rail-*

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way Co. v. Crawford, 24 Ohio St., 631; *Railway Co. v. Rathgeb*, 32 Ohio St., 66. The judgment of the court of common pleas was right, and it follows that *the judgment of the circuit court must be reversed and that of the common pleas affirmed.*

BURKET, SPEAR, and SHAUCK, JJ., concur.

MINSHALL, C. J., dissents.

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THEOBALD ET AL. v. FUGMAN ET AL.

Heir at law, how designated—Section 4182, Rev. Stat.—Adopted heir not one of issue under section 5915, Rev. Stat.—Charitable bequests, within one year of death of testator—Not invalid as to adopted heir, when—Legacies not specifically charged upon realty become a lien thereon, when—Law of inheritance—Law of wills.

1. One, not of the blood of the testator, who has been designated an heir under favor of section 4182, Revised Statutes, is not issue of the body of such testator within the meaning of section 5915, Revised Statutes. Hence bequests in the will to benevolent, religious, educational or charitable purposes, are not rendered invalid, as respects such heir, by reason of the fact that the will was executed within one year of the decease of the testator.
2. Legacies not specifically charged upon real estate will, nevertheless, be held to be charged upon such real estate, and be a lien thereon, where it appears that the testator, at the time the will was made and at his decease, had no moneys or personal estate of any kind out of which such legacies could be paid, unless a contrary intention is manifest from the whole will.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Hamilton county.

The controversy had its origin in a suit to quiet title to certain lands situate in the city of Cincinnati

brought by the defendants in error, Frank Fugman and Katie Margaretha Fugman against Chrysostomus Theobald, as pastor of St. Francis Seraphicus Roman Catholic Church, and others. Issue was made up by answer and cross-petitions and replies, and a trial had, which resulted in a judgment in favor of the plaintiffs in part and in part in favor of defendants, from which appeals were taken by the several parties to the circuit court. That court made the same findings and rendered the same judgment as that of the court below, and the contestants come here by petition in error on the part of Theobald et al., defendants below, and by cross-petition in error on the part of Frank and Katie Margaretha Fugman. Facts necessary to an understanding of the points decided follow:

In the year 1891, one Margaretha Fugman filed in the probate court of Hamilton county her written application designating and appointing Frank Fugman and Katie Margaretha Fugman, plaintiffs below, as her heirs at law under section 4182, Revised Statutes, and the court thereupon made and entered its proper order thereon. On April 8, 1894, the said Margaretha Fugman died at Cincinnati, seized in fee simple of the real estate the subject of the action, and the plaintiffs below were, at the time of the filing of the petition, in actual possession of the same. The deceased also left a last will dated February 21, 1894, which was duly admitted to probate and record April 23, 1894. She left no issue of her body. She was possessed, at the time of the making of the will, and at the time of her decease, so far as could be ascertained, of no personal property excepting household goods and furniture, and no moneys or other personal property came into the hands of her executors. The say-

ing of mass for the dead is one of the religious services or ceremonies of the Catholic church. The clauses of the will involved in this litigation are the following:

Item 1. It is my will that all my debts and funeral expenses be paid.

Item 2. I give and bequeath to Frank Fugman, formerly Held, who has lived in my family and who has had his name changed to Fugman by act of legislature of Ohio, whom I have designated as my heir at law by proceedings in the probate court of Hamilton county, O., in accordance with a mutual understanding between myself and my husband during his lifetime, the sum of one hundred dollars (\$100), he having received during the lifetime of my deceased husband the sum of five hundred dollars (\$500), and during the lifetime of myself the sum of two thousand dollars (\$2,000).

Item 3. I give and bequeath to Katie Margaretha Fugman, formerly McGovern, who has lived in my family and has had her name changed to Fugman by act of legislature of Ohio, and whom I have designated as my heir at law by proceedings in the probate court of Hamilton county, Ohio, in accordance with a mutual understanding between myself and my husband during his lifetime, all household goods and furniture left by me.

Item 4. I also give and bequeath to Katie Margaretha Fugman, formerly McGovern, the sum of three hundred dollars (\$300).

Item 5. I also give and bequeath to Katie Margaretha Fugman, formerly McGovern, the sum of one thousand dollars (\$1,000) to hold in trust by my appointed executor until she reaches the age of thirty years.

Item 6. I give and bequeath to the pastor of St. Francis Seraphicus Roman Catholic Church, at the northwest corner of Liberty and Vine streets, Cincinnati, Ohio, and his successors, the sum of three hundred dollars (\$300) for the saying of masses for the repose of my soul and the soul of my deceased husband.

Item 7. I give and bequeath to the pastor of St. Clement Roman Catholic Church, at St. Bernard, Hamilton county, Ohio, and his successors, the sum of one hundred dollars (\$100), for the saying of annual masses on All Souls Day of each year for the repose of my soul and that of my deceased husband.

Item 8. I give and bequeath to the St. Francis Hospital, on Queen City avenue, Cincinnati, Ohio, the sum of one hundred dollars (\$100).

Item 9. I give and bequeath to Joseph Wiemann, my brother, of the city and state of New York, the sum of three hundred dollars (\$300).

Item 10. I give and bequeath to my niece, Katie Hollerman (daughter of my brother Joseph), of Jersey City Heights, Jersey City, New Jersey, the sum of three hundred dollars (\$300).

Item 11. I give and bequeath to my nephew, Joseph Wiedenborn (son of my sister Catherine by her first marriage), of the city and state of New York, the sum of one hundred dollars (\$100).

Item 12. I give and bequeath to my nephew, Bernard McGovern (son of my sister Catherine by her second marriage), of the city and state of New York, the sum of one hundred dollars (\$100).

Item 13. I give and bequeath to my niece, Rosa Brauer (daughter of my sister Rosa), of the city and state of New York, the sum of two hundred dollars (\$200).

Item 14. I give and bequeath to widow Katie Burckhardt (daughter of my sister, Rosa Baumart) the sum of two hundred dollars (\$200).

Item 15. I give and bequeath to my niece, Anna Ficker, of Cincinnati, Ohio (daughter of my sister Catherine), the sum of one hundred dollars (\$100).

Item 16. I give and bequeath to Andrew Fugmann and Philip Fugmann (brothers of my deceased husband), of Wappinger Falls, New York, each, the sum of three hundred dollars (\$300).

Item 17. I give and bequeath to Christina Singer (sister of my deceased husband), of Cincinnati, Ohio, the sum of two hundred dollars (\$200).

Item 18. I give and bequeath to the Catholic St. John Cemetery, at St. Bernard, Hamilton county, the sum of one hundred dollars (\$100), interest of same to be used to keep our graves in good order.

Item 19. I give and bequeath to the Catholic Church at Burgkindstadt, Koenigreich, Bayern, Landgericht, Weizmann, Ober Franken, Germany, the sum of three hundred dollars (\$300) to provide a fund for clothing for poor children at communion.

Item 20. I also give and bequeath to the above-named church as described in Item 19 the sum of two hundred dollars (\$200) for Ablas and to pray and say masses on the day of my death and husband for the repose of my soul and soul of deceased husband. The name of said chapel being Fuenf Funden Kapelle.

Item 21. I give and bequeath to Kate Melzer, of Reisbach Nieder, Bayern, Germany, the sum of one hundred dollars (\$100).

Item 22. All the rest and residue of my estate, wherever situate, and be the same real, personal or mixed, I give and bequeath unto the pastor of the St. Francis Seraphicus Roman Catholic Church, or

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his successors, at the northwest corner of Liberty and Vine, Cincinnati, Ohio, for the saying of masses on the day of my death and that of my husband.

Ledyard Lincoln; Henry Baer and Frederick G. Roelker, for plaintiffs in error. .

Goebel & Bettinger and Arnold Speiser, for defendants in error.

SPEAR, J. Two questions arise upon the record: (a) Are the bequests for religious and charitable purposes, and the residuary devise in the will, void as against the rights of Frank and Katie Margaretha Fugman, the will having been executed within one year of the testatrix's decease? (b) Are the general legacies a lien and charge on the real estate, there being no personal property, and no provision in the will making such legacies a direct charge upon the real estate?

The elaborate and very learned arguments of the counsel invite an extended discussion of these questions. But, while they are important, they appear to us, in view of previous holdings, not difficult of solution, and may with propriety be treated briefly. Indeed but little more is required than a statement of the conclusions to which the court has arrived.

1. In a word, if Frank Fugman and Katie Margaretha Fugman stand with respect to this property the same as though they were heirs of the body of the testatrix, then the charitable and religious bequests and the residuary devise, are, as to them, void. It was the opinion of the courts below, and is contended here, that they do sustain that position. This conclusion, it is claimed, results from a proper construction of sections 4182 and 5915 of the Revised Stat-

utes. The former, which was enacted April 29, 1854, is as follows:

"Section 4182. [Heir at law; how designated, etc.] A person of sound mind and memory may appear before the probate judge of his county, and in the presence of such judge and two disinterested persons of his or her acquaintance, file a written declaration, subscribed by him, which declaration shall be attested by such disinterested persons, declaring that, as his or her free and voluntary act, he or she did designate and appoint another, naming and stating the place of residence of such person specifically, to stand toward him or her in the relation of an heir at law in the event of his or her death; thereupon the judge, if satisfied that such declarant is of sound mind and memory, and free from any restraint, shall enter that fact upon his journal, and make a complete record of such proceedings; thenceforward the person thus designated shall be deemed and held to stand in the same relation, for all purposes, to such declarant as he or she could, if a child born in lawful wedlock; and a certified copy of such record shall be *prima facie* evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud, or undue influence."

The latter, which was enacted in 1874, is as follows:

"Section 5915. [Any bequest or devise to charitable purposes, if any issue of testator living, void, unless made one year before his death.] If any testator die leaving issue of his body, or an adopted child, living, or the legal representative of either, and the will of such testator give, devise, or bequeath the estate of such testator, or any part thereof, to any benevolent, religious, educational, or charitable purpose, or to

this state or (to) any other state or country, or to any county, city, village, or other corporation or association in this or any other state or county, or to any person in trust for any of such purposes, or municipalities, corporations, or associations, whether such trust appears on the face of the instrument making such gift, devise, or bequest or not; such will as to such gift, devise or bequest, shall be invalid unless such will shall have been executed according to law, at least one year prior to the decease of such testator."

The latter section is an amendment to the wills act. The provisions of statute relating to wills, and authorizing and recognizing the right to make the same, had their origin at the formation of the territory northwest of the river Ohio, and of which the present state of Ohio is a part, in the year 1787, by provision of the ordinance for the government of that territory. The first section of that memorable document (1 Laws of Northwest Territory, 3), provides that, until the governor and judges adopt laws on the subject, estates in the territory may be devised or bequeathed by wills in writing, duly signed, sealed and witnessed. Conformably to the authority given in the ordinance the governor and judges of the territory, June 19, 1795 (same vol., 148), at Cincinnati, adopted from the Pennsylvania code and published, a law concerning the probate of wills, written or nuncupative, and providing for the execution, proof, and record of the same. This remained in force until 1805, when, on January 5, of that year, (3 O. L., 173), the first general assembly of the state enacted the first state law on the subject entitled "An act directing the manner of executing, proving and recording wills and codicils," and recognizing the right of competent persons

to convey their estates by will. With various amendments this statute has been in force ever since. And whether the right to dispose of property by will is regarded as a natural right, inhering in the ownership of property, or as resting wholly on these ancient statutes, it is entirely clear that the right thus created is of a high order, not to be denied or materially qualified except upon the clearest declaration of law to that effect. To maintain the action of the courts below it must appear that the right to thus dispose of the property is, as applied to the defendants in error, modified so that the right does not exist unless exercised within a period of more than one year prior to the testator's death. That this modification applies to such heirs as are of the "issue of the body" of the testator, and to adopted children, (that is to those adopted under section 3137 and following, of the Revised Statutes), the language of the section (5915) very clearly establishes. But does it apply to heirs designated under section 4182? The section does not in terms include such heirs. Should the language of section 4182 that such declared heir "shall be deemed and held to stand in the same relation, for all purposes, to such declarant as he could if a child born in lawful wedlock, be held to constitute such child "issue of the body?" That is, in law is such declared heir "issue of the body?" If not, then the contention in support of the judgments below on this part of the case must fail.

The legal effect of the word "issue" was considered by this court in *Phillips v. McConica*, 59 Ohio St., 1. In that case one Madden died leaving a will by which he made a bequest to one Wilbert McConica. This legatee died after the making of the will but before the decease of the testator. During his life he (the

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legatee) adopted, by force of section 3137 and following, one Mary McConica, and the question was whether or not the child so adopted was, under section 5971, Revised Statutes, entitled to inherit. That section provides that when a devise of real or personal estate is made to any child or other relative of the testator, and such child or other relative shall die after the making of the will leaving issue surviving the testator, such issue shall take the estate. The court held: "The word 'issue' in this section means child of the body, or heir of the body, of the deceased relative of the testator, and does not include a child adopted by such decedent. The issue in such case must be of the blood of the testator and of the deceased child or other relative by birth. Adoption does not make the adopted child of the blood of its adopter, nor of the blood of his ancestors. True, section 3140, Revised Statutes, provides that such adopted child 'shall be to all intents and purposes the child and legal heir of the person so adopting him, or her, entitled to all the rights and privileges, and subject to all the obligations of a child of such person, begotten in lawful wedlock.' But this is far from providing that such adopted child shall be the issue of the adopter, and of his blood and of the blood of his ancestors. * * * The statute enables the adopted child to inherit from its adopter, but not through him. The statute does not make the adopted child the heir of the ancestors of its adopter, and the right of the adopted child to inherit cannot be extended beyond where the statute has fixed it."

It is difficult to perceive any real difference, in legal effect, between the language of the quotation given above, from section 3140, and the clause declaring the status of designated heirs found in section

4182, and if they are in legal effect the same, then this case is ruled in favor of plaintiffs in error by the Phillips case. We think it is so ruled. See, also, *Uppson v. Noble*, 35 Ohio St., 655; and *Quigley v. Mitchell*, 41 Ohio St., 375.

The further consideration of the several sections referred to makes this conclusion clear. Both sections 3140 and 4182 were in force, and had been for years, when section 5915 was adopted. The legislature thus found, besides blood relations capable of inheriting from an ancestor, two classes having certain statutory rights of inheritance, viz.: adopted children and designated heirs. With these two conditions before the law makers they chose to expressly include within the effect of section 5915 one of those classes and omit the other. If we apply the well known rule of construction *expressio unius est exclusio alterius*, the inevitable result is that designated heirs are not within the statute. Other considerations tend to the same conclusion, but we content ourselves with those stated. We hold that heirs designated under favor of section 4182 are not within the purview of section 5915. It follows that, in holding, as the circuit court did, that the legacies set forth in items 6, 7, 8, 19, 20 and 22 are invalid under section 5915, Revised Statutes, that court erred.

2. The circuit court held that the legacies mentioned in items 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 21 are valid money legacies, and were intended to be charged upon the real estate, and are valid liens thereon. This holding is complained of as erroneous by the cross-petition in error of Frank and Katie Margaretha Fugman. A controlling fact bearing upon the effect to be given these items of the will is that the testatrix had, at the time of the mak-

ing of the will and at her decease, no personal property out of which these legacies could be paid, and this fact, it must be presumed, was known to her. To conclude that she did not intend to charge payment of the legacies upon the real estate, is to conclude that she did not intend they should be paid at all, and would make the will, in those particulars, an idle ceremony. We think there is no error in the holding of the circuit court in this respect. *Clyde v. Simpson*, 4 Ohio St., 445; *Moore v. Beckwith*, 14 Ohio St., 129.

It is further contended by plaintiff in error that a petition to quiet title is not the proper action to determine the questions which arise upon the admitted facts of the case. We do not find it necessary to consider the proposition.

The judgment of the circuit court will be reversed as to its holding respecting items 6, 7, 8, 19, 20 and 22 of the will, and otherwise affirmed.

Reversed.

MINSHALL, C. J., BURKET, DAVIS and SHAUCK, JJ., concur.

WILLIAMS, J., concurs in the second proposition.

IN THE MATTER OF THE ESTATE OF AMANDA L. HINTON, DECEASED.

Judgment of court in trial upon conceded facts—Motion for new trial not necessary—Children under fifteen entitled to allowance from estate of deceased mother as from father—Law of infancy.

1. Where the facts are conceded or agreed upon in a trial, the judgment of the court rendered upon such facts, may be reviewed in a higher court by petition in error, without a motion for a new trial.
2. Children under fifteen years of age, are entitled to have set off and allowed to them out of the estate of their deceased mother, sufficient provisions or other property, or money, to support them for twelve months, in like manner as they are entitled to such support out of the estate of their deceased father.

(Decided May 7, 1901.)

ERROR to the circuit court of Belmont county.

On the 27th day of December, 1898, Joseph T. Hinton departed this life intestate, leaving Amanda L. Hinton his widow, and Maud Hinton over fifteen years of age, and four other children under the age of fifteen years, his only heirs. An administrator was appointed on his estate and there was set off to the widow and said four children under the age of fifteen years the sum of thirty dollars each for one year's support, and also certain personal property named in the inventory.

On the 26th day of July, 1899, said Amanda L. Hinton died intestate leaving said five children her only heirs at law, said four children being still under the age of fifteen years. Theodore Chappell was duly appointed administrator of her estate, and the appraisers set off to said four minor children for one

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year's support the sum of \$150.00, to each, and also some of the personal property which had been set off to the widow by the other administrator, as being exempt under the statute.

Thereupon George W. Hance, the duly appointed guardian of said Maud Hinton, who was over fifteen years of age, filed exceptions to said inventory, claiming that said four children under fifteen years of age were not entitled to a year's support out of the estate of their mother, and were not entitled to have said personal property set off to them under the statute as not being assets of their mother's estate.

The probate court sustained the exceptions, and the administrator appealed to the court of common pleas, where the case was heard upon an agreed statement of facts from which the above facts are taken. The common pleas overruled the exceptions. Thereupon the guardian of Maud filed his petition in error in the circuit court, and that court reversed the judgment of the common pleas and held the exceptions well taken. Thereupon the administrator of the estate of Mrs. Hinton filed his petition in error in this court, seeking to reverse the judgment of the circuit court, and for an affirmance of the common pleas.

Petty & Crew, for plaintiff in error, cited the following authorities:

Sears v. Hanks, 14 Ohio St., 298; *McConville v. Lee*, 31 Ohio St., 447; *Smyth on Homesteads and Exemptions*, Sec. 519; *True v. Morrill*, 28 Vt., 674; *State v. Harmon*, 31 Ohio St., 250; *Tracy v. Card*, 2 Ohio St., 431; *Pollock v. Speidel*, 27 Ohio St., 86; *Brower v. Hunt*, 18 Ohio St., 311; *State v. Buchanan*, Wright, 233; *Brown v. Hemphill*, 74 Ga., 795; *Starr & Curtis*, Annotated Stats. of Illinois, Vol. 1,

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pages 223-5; *Leshner v. Worth*, 14 Ill., 39; 46 Cal., 259; 22 Pa. St., 191; 9 Allen, 156; 4 Conn., 455; 7 Mo., 286; 17 Mo. App., 593; Statutes of Penn., Brightly's Purdon's Digest (12th ed.), Vol. 1, page 584; *Himes' Appeal*, 94 Pa. St., 381; *King's Appeal*, 3 Norris, 345.

G. A. Colpitts, for defendant in error, cited the following authorities:

State v. Commissioners, 36 Ohio St., 326; *Conger v. Barker*, 11 Ohio St., 1; Sedgwick Stat. and Const. Law, 299, 365; *Williams v. State*, 35 Ohio St., 175; *Ash v. Ash*, 9 Ohio St., 387; *Van Camp v. Board of Ed.*, 9 Ohio St., 408; *Bank v. Ayers*, 16 Ohio, 282; *Earp v. Railway Co.*, 12 Ohio St., 621; *Westfall v. Dungan*, 14 Ohio St., 276; *Brown v. Mott*, 22 Ohio St., 149; *McGonnigle v. Arthur*, 27 Ohio St., 251; *Lockwood v. Krum*, 34 Ohio St., 1.

BURKET, J. There was a motion made in the common pleas court to dismiss the appeal taken by the administrator, for the reason that he filed no appeal bond. The motion was overruled and exceptions taken. There was no error in overruling this motion. The record shows that the administrator was duly appointed and qualified. He therefore gave bond in this state for the faithful discharge of his duties. The record also discloses that his appeal was in the interest of the trust, and not for his own interest. In such cases no bond is required under section 6408, Revised Statutes, but he shall be allowed an appeal by giving written notice to the court of his intention to appeal, within the time limited for giving bond. He gave written notice of appeal, and thereby availed himself of the statute, and was not required to give an appeal bond.

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There was also a motion filed in the circuit court by counsel for the administrator to strike the bill of exceptions, taken in the common pleas, from the files, for the reason that no motion for a new trial was filed in that court. The circuit court overruled the motion and an exception was noted. There was no error in overruling this motion, for the reason that a motion for a new trial was not necessary. The facts were agreed upon, that is conceded, and all that was necessary was for the court to apply the law to the conceded facts. There was no evidence to be weighed or considered, the only question being whether the court rendered the right judgment upon the facts as conceded and agreed upon by both parties. In such cases a motion for a new trial is not necessary. *Brown & Co. v. Mott Bros.*, 22 Ohio St., 149; *McGonnigle v. Arthur*, 27 Ohio St., 251, 257.

Having disposed of these questions of practice, we come now to the real contention in the case. The administrator of the estate of Mrs. Hinton claims that the children under fifteen years of age are entitled under the statute to have set off to them a year's support and other personal property, out of the estate of their mother, as well as out of the estate of their father, that is that they are entitled to such allowance out of each estate; while the guardian of Maud claims that the children under fifteen years of age are entitled to such year's support and other personal property out of the estate of the father only, and having had set off to them a year's support and other personal property, not deemed assets under the statute, out of the estate of their father, they are not entitled to a second such allowance out of the estate of their mother, even though she died possessed of a separate estate.

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The first statute in this state providing for a year's support was section 43 of the act relating to the administration of estates of deceased persons passed March 23, 1840, S. & C., 574, and provided as follows: "When a man having a family, shall die leaving a widow or a minor child, the following articles shall not be deemed assets." Then follows a list of personal property.

This section 43 was amended March 12, 1861, 58 O. L., 45, and provided that: "When any man shall die leaving a widow or minor child under the age of fifteen years, etc." It changed the list of property not to be deemed assets, and for the first time provided for property to the amount of one hundred dollars to be retained by the widow and children.

This section 43 was again amended April 9, 1863, 60 O. L., 67, so as to read as follows: "That when any person shall die leaving a widow or minor child under the age of fifteen years, the following property shall not be deemed assets, or administered as such, etc." This amendment changed the words of the section, "When any *man* shall die," to, "That when *any person* shall die, etc." And there was very good reason for this change. After the amendment of the section, March 12, 1861, in which the word "man" was retained, the general assembly on April 3, 1861, passed the statute concerning the rights and liabilities of married women, 58 O. L., 54, under which it became evident that married women would accumulate property and estates in their own right, and therefore it became necessary to provide for the disposition of such property and estates upon the death of such women. Before the passage of the Married Woman's Act, in 1861, the marital rights of husbands at common law obtained in this state, and married

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women rarely had any property to be administered at their death, but the act of 1861 changed this, and as it became evident that women would leave property to be administered at their death the same as men, the statute relating to such administration was amended to fit the change caused by the said married woman's act.

Said section 43 was again amended May 12, 1868, 65 O. L., 180, and was carried into the Revised Statutes as section 6038, as follows: "When any person shall die, leaving a widow or minor child, or children under the age of fifteen years, the following property shall not be deemed assets or administered as such, but shall be included and stated in the inventory of the estate, and signed by the appraisers, without appraising the same." (Here follows a list of personal property.)

Section 6040, Revised Statutes, reads as follows: "The appraisers shall also set off and allow to the widow, and children under the age of fifteen years, if any there be, or if there be no widow, then to such children, sufficient provisions or other property to support them for twelve months from the death of the decedent; and if the widow or such children have, since the death of the deceased, and previous to such allowance, consumed for their support any portion of the estate, the appraisers shall take the same into consideration in determining the amount of the allowance."

Section 6041, Revised Statutes, reads as follows: "When there is not sufficient personal property, or property of a suitable kind, to set off to the widow or children, as provided in the preceding section, the appraisers shall certify what sum or further sum, in

money, is necessary for the support of such widow or children."

The said sections 6040 and 6041 are the same now as when originally passed in 1840. The duties of the appraisers varied under each amendment of the statute in 1861, 1863 and 1868 as the personal property not deemed assets but required to be included and stated in the inventory, varied. Their duties as to setting off sufficient provisions or other property to support the widow and children under fifteen years of age, for twelve months, or if there was no widow, then to support such children for twelve months arose and applied only to cases in which "a man having a family died," or a "man died leaving a widow or minor children, etc," until the amendment of 1863 changed the statute and made those duties of the appraisers apply, "when *any person* died leaving a widow or minor child or children under the age of fifteen years." Under the statute of 1840 the limitation was to "a man having a family," and under the amendment of 1861, the limitation was to "any man leaving a widow and minor child." Under the amendment of 1863 and 1868 the limitation is to, "*any person*." If "a man having a family," or "any man," and "any person," are one and the same individual, the contention of the defendant in error is right, but if, "any person," is a broader term than, "a man having a family," or, "any man," then his contention is wrong. A man may die leaving a widow or child, and yet not be a man having a family as the word family is usually understood. To be entitled to certain exemptions under Section 5435, Revised Statutes, the husband and wife must be living together, and for a widow or widower to be entitled to such exemption on account of his unmarried daughter or unmarried

minor son, he must be living with such child. The amendment of said section 43, in 1861, was therefore broader than the same section in the original act, and was evidently intended by the general assembly to be broader. The amendment of the same section in 1863 was broader still, and included "any person," male or female, leaving a child at his or her death. And in our opinion the words "any person" include both men and women. This seems to us too clear for argument or the citation of authorities. The general assembly having changed the limitation from "a man having a family," first to, "any man," and then to, "any person," and having good reasons for making the latter change, in view of the Married Woman's Act, of April 3, 1861, we must conclude that it meant what it said, and that children under fifteen years of age are entitled to a year's support out of the estate of their mother, the same as such children are entitled to such support out of the estate of their father, and that this is so even though the father and mother should both die leaving estates. Such are the plain words of the statute, and it is not for this court to attempt to get rid of them, by a strained construction conforming to a supposed hidden and unexpressed intention of the general assembly. The general assembly must be credited with understanding the meaning of plain words, and when so radical a change is made in plain language by amendment, not by revision, as was done in this instance, it must be presumed that a change in meaning was intended, otherwise the general assembly would be compelled to add to each amendment, of a statute, a declaration that the amendment was intended to mean what it says, and was intended to change the former statute. We are fully content with the rule of construction, as to revision of statutes, laid

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down in *State ex rel. v. Commissioners*, 36 Ohio St., 326; *Conger v. Barker*, 11 Ohio St., 1, and other cases cited by defendant in error, but they do not apply in this case, because here it is too plain that the amendment of 1863 was intended to work a change in the meaning of the statute; *Collins v. Miller*, 57 Ohio St., 289.

The circuit court erred in its construction of the statute, and its judgment will be reversed, and the judgment of the court of common pleas affirmed.

Judgment reversed.

MINSHALL, C. J., WILLIAMS, SPEAR, SHAUCK and DAVIS, JJ., concur.

MARKLE v. NEWTON. TREASURER, ETC.

Authority of county auditor to enter up omitted taxes—In liquor business—Not restricted to current year—Omissions of previous years may be entered and collected—Act of April 12, 1900 (94 O. L., 133)—Dow tax law.

The authority of the county auditor to enter upon the duplicate omitted taxes on the business of trafficking in intoxicating liquors is not restricted to those of the current year. Except as otherwise provided by the amendatory act of April 12, 1900 (94 O. L., 133), such taxes omitted in previous years may be entered on the duplicate of the current year, and collected as other taxes.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Medina county.

Action to enjoin collection of Dow law tax. Demurrer to petition sustained, and action dismissed. Judgment affirmed by circuit court. Affirmed.

Guy Markle brought his action in the common pleas of Medina county, against James Newton, the treas-

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urer of that county, to enjoin the collection, by the latter, of taxes charged against the plaintiff on his business of trafficking in intoxicating liquors in that county for the years 1896, 1897 and 1898. The allegations of the petition are as follows:

"Plaintiff says: That the defendant is the duly elected, qualified and acting treasurer of said Medina county, Ohio. That the plaintiff is a resident and taxpayer in said Medina county, and that he duly paid all the taxes assessed against him on the duplicate of said county for the years 1896, 1897 and 1898, when the same became due and payable. That notwithstanding the plaintiff had duly paid all of said taxes for said years as aforesaid, the auditor of said Medina county, assuming and pretending to correct the returns of the plaintiff for taxation in said years, but wholly without authority of law for so doing, on the 24th day of June, 1899, charged the plaintiff on the duplicate for said year, 1899, with the sum of \$313 as the tax on the business of trafficking in intoxicating liquors from the third day of July, 1896, to the fourth Monday in May, 1897; with the sum of \$350 as the tax on the business of trafficking in intoxicating liquors from the fourth Monday of May, 1897, to the fourth Monday of May, 1898; and with the sum of \$350 as the tax on the business of trafficking in intoxicating liquors from the fourth Monday of May, 1898, to the fourth Monday of May, 1899. That said several amounts were so charged by said auditor against the plaintiff on said duplicate without any evidence before him that the plaintiff was engaged in the business of trafficking in intoxicating liquors in either of said years, or any part of any of said years.

That said duplicate, with the several amounts illegally charged thereon against the plaintiff as taxes on the business of trafficking in intoxicating liquors in said several years, as aforesaid, is now in the hands of said defendant as such treasurer for collection, and, unless restrained by the process of this court, said defendant as such treasurer, threatens to and will compel the plaintiff to pay said illegal tax, to the great and irreparable damage of the plaintiff.

Plaintiff therefore asks that a temporary restraining order be granted enjoining said defendant as such treasurer from proceeding to collect said illegal taxes from the plaintiff, or in any way compelling plaintiff to pay the same, until the final hearing of this cause, and that on such final hearing that said injunction may be made perpetual, and for such other and further relief as plaintiff is, in equity, entitled."

A general demurrer to this petition was sustained by the common pleas and final judgment rendered against the plaintiff; and from the affirmance of that judgment by the circuit court, error is prosecuted here.

Lee Elliott, for plaintiff in error, cited the following authorities:

Insurance Co. v. Hard, 59 Ohio St., 248; *State v. Akins*, 63 Ohio St., 182; *Adler v. Whitbeck*, 44 Ohio St., 539; *Brewing Co. v. Talbot*, 59 Ohio St., 511.

E. W. Woods, with whom was the Attorney General, for defendant in error, cited the following authorities:

Brewing Co. v. Talbot, 59 Ohio St., 511; *Wasteney v. Schott*, 58 Ohio St., 410; *Kellogg v. Ely*, 15 Ohio St., 64; *Goodwin v. Canal Co.*, 18 Ohio St., 169,

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Bank v. Hubbard, 98 Fed Rep., 465; *Spangler v. Cleveland*, 43 Ohio St., 526; *Van Valkenburg v. Kingsbury*, 14 Ohio St., 353; *Whitaker's New Annotated Ohio Civil Code*, 364; *Badger v. Badger*, (2 Wall.), 87; *McBlair v. Gibbes* (17 How.), 232. 105 Mass., 334; *Insurance Co. v. Hard*, 59 Ohio St., 248.

WILLIAMS, J. The petition contains no allegation that the plaintiff was not engaged in carrying on the business of trafficking in intoxicating liquors in the county of Medina during the years for which the tax complained of is charged against him, nor that he did not become legally chargeable with the tax in each of those years. The sole ground upon which his right to the relief sought is predicated, is, that the action of the county auditor in placing the tax for the preceding years on the duplicate of 1899, was without authority of law, and, consequently, that duplicate constitutes no lawful warrant for the collection of the tax by the county treasurer. This question, though involved in the case of *Jung Brewing Co. v. Talbot*, 59 Ohio St., 511, was not there presented by counsel, nor considered by the court; and we regard that case as presenting no obstacle to the consideration of the question here, as an original one. Nor, can a tax be justified merely upon equitable considerations. Public burdens of that nature can be sustained only when authorized by positive law. And when such burden is illegally imposed, it is a statutory right of the party against whom it is charged to stay its collection by injunction.

Looking to our statutes, then, for the necessary authority for the imposition and collection of the tax in question, we find it provided by Section 4364-9 of

the Revised Statutes, that: "Upon the business of trafficking in spiritous, vinous, malt, or any intoxicating liquors there shall be assessed yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation or co-partnership engaged therein, and for each place where such business is carried on, by, or for such person, corporation or co-partnership the sum of three hundred and fifty dollars." It is further provided by Section 4364-10: "That said assessment together with any increase thereof, as penalty thereon, shall attach and operate as a lien upon the real property on and in which such business is conducted, as of the fourth Monday of May of each year, and shall be paid at the times provided for by law for the payment of taxes on real or personal property within the state, to-wit: one-half on or before the twentieth day of June, and one-half on or before the twentieth day of December of each year."

The first of these sections, in positive and direct terms, imposes a tax of a specific amount, unconditionally upon every place where the business of trafficking in intoxicating liquors is carried on, and in like terms requires the person, corporation or co-partnership, by or for whom the business is carried on, to pay into the county treasury, each year the business is so carried on, the amount of the tax so imposed. The times when the tax shall be paid are definitely fixed by the next section, namely, "one-half on or before the twentieth day of June, and one-half on or before the twentieth day of December of each year." The proceeding provided by statute for the assessment of taxes on real or personal property has no analogy or application to a tax of this character. To assess a tax upon property, its valuation must be brought before the county auditor in the mode provided by law, from

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which, and the rate of taxation, he ascertains and charges up on the duplicate the appropriate amount of taxes against the property and its owner. So, in bringing upon the duplicate additional property, where there have been omissions or false returns, the auditor must ascertain the value of the omitted property and assess upon it taxes according to the required rate. Obviously, the term "assessed" in Section 4364-9, above quoted, is not there used in that sense, but rather in the sense of "charged," as if the provision read, there shall yearly stand charged against each place where the business, etc., is carried on, the sum of three hundred and fifty dollars, which shall be paid into the county treasury by the person, etc., by and for whom the business is carried on. No official action of the county auditor is necessary to the creation or ascertainment of this specific debt to the state, nor to the obligation of the person charged with its payment. Both are created, and the amount fixed, by the express provision of the statute, and both continue until discharged by payment. With respect to such tax, provisions like those contained in Sections 2781, and 2782, of the Revised Statutes are unnecessary and inappropriate.

The mode of procedure for enforcing payment of this tax is prescribed by other provisions of the statute. Section 4364-12 provides: "That if any person, corporation or co-partnership shall refuse or neglect to pay the amount due from them under the provisions of this act within the time therein specified, the county treasurer shall thereupon forthwith make said amount due with all penalties thereon, and four per cent. collection fees, and costs, by distress and sale, as on execution, of any goods and chattels of such person, corporation or co-partnership;" and that

section contains further provisions which give the levy of the treasurer priority over all other liens on the chattel property of the delinquent, and denies any exemption of his property from such levy and sale; and then it provides that: "In the event of the treasurer, under the levy provided for under this act, being unable to make the amount due thereunder, or any part thereof, the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which said traffic is carried on, and the same shall be collected as other taxes and assessments on said premises." It seems clear from these provisions that the amount of the tax imposed by Section 4364-9 becomes at once, by force of the statute, an existing debt of the person who carries on the designated business, and that the statute itself is not only a sufficient warrant to the treasurer for the collection of the tax, before it is entered on the duplicate against the real estate where the business was carried on, but enjoins on him the explicit duty to make such collection. The method provided by Sections 4364-13 and 4364-14, for getting the tax on the duplicate, briefly is, that the district assessors make returns to the county auditor of the places, within their respective jurisdiction, where such business is carried on, with the name of the person engaged therein, a description of the premises where the same is conducted, and the name of the owner of the premises. From these returns the county auditor makes up and preserves in his office a duplicate, alphabetically arranged, showing the amount of the tax, by whom to be paid, and the premises whereon the same is a lien; and he is required to deliver a copy of the duplicate to the county treasurer for collection, by the first

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Monday of June of each year. And Section 4364-14 contains the provision that: "Upon receiving satisfactory information of any such business liable to assessment or increased assessment, as aforesaid, not returned by the assessor, he (the auditor) shall forthwith enter the same upon such duplicate, and upon the county treasurer's copy thereof." It is not made essential to the lawful action of the auditor in supplying the omission under this clause of the statute that the omission shall be one which was made by the assessor in his return for the current year. The language is broad enough to authorize the entry of an omission of a preceding year which has been brought to the knowledge of the auditor. The action of the auditor in making the entry is a mere ministerial and clerical act whose performance, we believe, is not essential to the validity of the tax. Nor, can the right of the state to the tax which it has directly imposed by statute for its legitimate purposes, be defeated in consequence of the omission of the assessor to make return to the auditor within a specific time, nor of the latter to enter it upon the duplicate within such time. But, if such entry were necessary, authority therefor, without restriction to the current year, is conferred by the statute.

This has been the legislative interpretation of the statute. The proviso inserted in the amendatory act of April 12, 1900 (94 O. L., 133), which constitutes the only amendment made by that act, exempts certain classes of liquor dealers therein mentioned from the tax on their business for any year prior to June 1, 1898, where no return thereof had been made to the county auditor, nor entry made by him on the duplicate, before that date. This provision made in

1900, for the exemption from any tax which had not been entered on the duplicate against the designated class of dealers prior to June, 1898, was unnecessary and without effect, if, without such provision the auditor was destitute of authority, in entering omissions on the duplicate against any class of dealers, to go back of the current year. The amendment is, therefore, a distinct legislative recognition that, except as therein provided, the auditor is clothed with such authority. The plaintiff's case is not within the exception.

An argument is made in behalf of the plaintiff, founded upon supposed inconveniences and hardships that would arise under the lien clause of the statute, if his contention be not sustained. That clause provides, as has been seen, that the tax shall attach as a lien on the premises where the business is conducted "as of the fourth Monday of May of each year;" and it is urged that, the traffic may have been carried on for a past year so secretly as to elude detection, and that a person ignorant of such use of the premises, and of any tax thereon on account of such business, could not with safety purchase the property. If the commencement of the lien, as against third persons dealing with the property, be limited to the year in which the tax is entered upon the duplicate, the apprehended consequences could not result. The duplicate would have the effect of notice by public record, and a person thereafter acquiring the property could not claim the protection of a *bona fide* purchaser. What the rights of a purchaser may be, against the state, must depend upon the facts of his case. We have no such case before us, and until one is presented for determination, a discussion of the

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question is best forborne. The existence of the lien is not necessary to the validity of the tax, but is only an additional means of securing its payment.

Judgment affirmed.

MINSHALL, C. J., BURKET, SPEAR, SHAUCK and DAVIS, JJ., concur.

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Devise by testator of certain lands to son for life and at his death to his heirs—Rule in Shelley's case—Land mortgaged by life devisee in fee simple—Foreclosure of mortgage and order of sale for life of mortgagor—Sheriff's deed to purchaser—Purchaser held possession over forty years—Action by heirs of mortgagor against occupant—Held sheriff's deed conveyed legal title.

1. Before the rule in Shelley's case was, as to wills, abrogated in this state by the statute of 1840, a testator devised certain lands to his son for life, and at his death to go to his heirs, and, there being nothing else in the will to show that the testator used the word "heirs" to designate a more limited class—as children: *Held*, That, as the lands passed under the will precisely as they would have descended at law, the son took an estate in fee simple in the lands so devised.
2. A mortgage in fee simple of certain lands was made to secure an obligation of the mortgagor to the mortgagee; it was foreclosed and an order made for the sale of the land for the life of the mortgagor, and was so sold; on confirmation, a deed in fee simple was ordered to be made to the purchaser, and such deed was made to him by the sheriff; the purchaser went into possession under his deed, and he and his successors in title continued in the adverse possession of the property for over forty years when an action was commenced by the heirs of the mortgagor against the present occupant under the title derived from the sheriff's deed, to recover the land: *Held*, That the sheriff's deed conveyed the legal title to the

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land, and the plaintiffs having at most but an equitable title, could not recover, without first obtaining a reformation of the deed. *Held further*, That the right of reformation of the deed accrued to the mortgagor upon its execution and was barred long before the commencement of the action by the heirs to recover the land.

(Decided May 7, 1901.)

Error to the Circuit Court of Montgomery county.

Young & Young and McMahon & McMahon, for plaintiff in error.

At the date of the will, Edward A. Peasley was a minor, and manifestly without children then living. There was no one living in whom the estate in remainder could vest. At the date of the deed he was not yet married and had no children. *Carter v. Reddish*, 32 Ohio St., 1; *Smith v. Hankins*, 27 Ohio St., 371.

The rule in Shelley's case was a rule of property and in full force as to wills at the date of this will; also as to deeds. *McFeely v. Moore*, 5 Ohio, 464; *Armstrong v. Zane*, 12 Ohio, 287.

The rule laid down by Judge Read in the case of *King v. Beck*, 15 Ohio, 559, the case relied upon by defendant in error, is as follows:

"If the estate for life, created in the devisee or donee, is limited precisely as it would descend at law, the rule in Shelley's case vests the *entire fee* in the first devisee or donee."

By this rule we are willing to be governed. In the case of *King v. Beck*, *supra*, the will contained other provisions giving to the estate devised a different direction under certain circumstances. Yet this same will was unanimously held to convey a fee simple by a supreme-court somewhat differently constituted. *King v. King*, 12 Ohio, 390.

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The application of the rule, in a case where it properly applies, is never excluded by explicit declarations that the title is for life only, etc. The text books teach this as well as the cases.

The title of *Ed. Peasley* being a fee simple, two questions are now to be considered:

1. The possession under a tax deed and judicial sale under which parties, since 1852, have been claiming and exercising ownership in fee simple.

2. The title conveyed by the judicial sale, independent of the possession.

Under the first heading: In 1852, when *Sullivan* took possession under his two deeds, the seven-year limitation law was in force. It was passed in 1849 and repealed in 1853 by the practice act. It can be found in 1 *Swan & Cr. Rev. Stat.*, p. 943 (notes); *Scott v. Hickox*, 7 Ohio St., 88.

This was eminently a statute of repose. When the law was repealed existing rights were saved. 2 *Swan & Cr.*, p. 941, Sec. 6.

Under the second heading—as to the judicial sale: *Edward Peasley* gave a warranty fee simple mortgage. The court ordered a deed in fee simple. And such a deed was executed. Having the full legal title, and having so warranted, can his heirs now be heard to say that the proceeding conveyed only a life estate?

If such a deed was improperly made, it was the act of the court. Does not the *legal* title pass subject to equitable correction? In such case ejectment will not lie.

Assuming that *Edward Peasley* had but a life estate, what is the situation? He had no children until after 1866, his first marriage. The will is not to his "children" in remainder, nor the deed, but to his "heirs." The devise in remainder was not,

therefore, to his "children." Had he died prior to 1866 his brother, or nephews, or wife, etc., would have taken as "heirs," unless the devise and deed created only a life estate and left the remainder undisposed of by reason of no person to take; and, in that case, his share would be fee simple by merger in so much as descended undisposed of. What became of the estate in remainder said to be created by the deed? Who was heir? Where was it?

When the proceedings to quiet title were brought, the suit was against the unknown "*heirs* of Edward A. Peasley." This is the language of the will—also of the deed. Whoever were "*heirs* of Edward Peasley" answered the description of "*devisees* of Aaron Peasley," and the notice was vastly better. One might know himself to be the heir of his father, and not know he was the devisee of his grandfather or other person. Hence if the advertisement can be sustained as within the law, it would be better than the one claimed to be right.

If an estate in *remainder* was created in the children of Edward Peasley after they came into existence, it was a vested estate, Edward having a life estate.

A person in possession can have his estate quieted as against an estate in remainder prior to the expiration of the life estate. *Rhea v. Dick*, 34 Ohio St., 420.

Now when counsel for Brockschmidt wished to make a better title how else could they proceed? Peasley had vanished and had not been heard of for years. It was not known where he was, or whether he was alive, or had children, or other heirs.

The law in such case provides a remedy, based upon such want of information.

The "heirs of Edward Peasley," whoever they might be, were the persons whose title was to be taken out of them. At the time of the suit the two children were in existence. If the title in remainder became executed at any time, it was then a *vested estate* in them, liable to be opened up to admit other children, if born afterwards. This vested estate was not contingent. It could have been sold. Now suppose that Edward had had no children, but nephews and nieces? If the suit had been brought against the "children of Edward Peasley," under the impression that he had children, the publication would have been worthless as against nephews and nieces. The law, knowing that it was sometimes impossible to find out "heirs" provides for such cases in general terms intended to cover every case. And it seems to us that to describe such persons in *the exact language under which they must take* is a complete compliance with the statute. They are a class of persons to be discovered by ascertaining their heirship to Edward Peasley. When that is accomplished they are devisees.

As to the alleged irregularities in the tax deed. *Sheldon's Lessee v. Coates*, 10 Ohio, 278; *Ward v. Barrows*, 2 Ohio St., 241; Sec. 4114, Rev. Stat., 66 Ohio Laws, 338.

After the lapse of forty years accompanied by open and notorious adverse possession, courts will make many presumptions in favor of repose. See 7 Am. L. Rec., 411; *Fitzpatrick v. Forsythe*, 6 Dec. (Re.), 682.

Humphrey Jones, for defendants in error.

There are two apparently conflicting provisions in this will. Under the first provision Edward A. Peasley in unquestionably given a fee simple estate in

said premises, the following language being used to create the same: "The whole to the said Edward and his heirs in fee simple."

But in the concluding clause of the will and immediately preceding the testatum clause the testator declares in explanation of his intention, that the devises to his sons, Edward and Theodore, are, "to be to them respectively during their natural lives, but so that they nor either of them cannot in their lifetime dispose of the same for any longer period than during their respective lives—giving each of them only a life estate in the land so devised to them, and after their deaths, the property to be to their respective heirs at law in fee simple."

It is a familiar rule in the construction of wills that in cases of apparent repugnancy and conflict between two provisions of the will, that the last one shall be given effect in preference to the first one appearing in the will. Jarman on Wills, 473; *Coonrod v. Coonrod*, 6 Ohio 114; *Young v. McIntire*, 3 Ohio, 498; *Parker v. Parker*, 13 Ohio St., 95.

It is the last clause of this will, therefore, which is of controlling importance in its construction.

The ordinary and usual import of the language employed in this clause, uncontrolled and unrestricted by any technical rules of construction, would vest a life estate in Edward A. Peasley, and a fee simple estate in remainder in his heirs at law. By statute in Ohio now, such would be its effect: (Sec. 5968, Rev. Stat.)

This provision was first enacted in 1840 (Swan's Statutes, 999), but as the will in question took effect in 1837, it is not controlled by the provisions of this legislation.

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This statute had the effect to abolish, as to wills, the rule in Shelley's case in Ohio.

It is contended that under the rule in Shelley's case Edward A. Peasley took a free simple estate by virtue of the will in question, and the real question involved here is, whether the construction of this will shall be controlled by the technical provisions of this rule, or whether effect shall be given to the plain, clear intention of the testator as evidenced by the language employed, giving to the words used their ordinary usual meaning.

The rule in Shelley's case may be stated as follows:

"Where a freehold is limited to one for life and by the same instrument the inheritance is limited, mediately or immediately, to his heirs, or to the heirs of his body, the first taker takes the whole estate either in fee simple or in fee tail, and the words, 'heirs' or 'heirs of his body,' are words of limitation and not words of purchase." *King v. King*, 12 Ohio, 390.

Coke states the rule in somewhat different language as follows: "When an ancestor by any gift or conveyance taketh the estate of freehold, and in the same gift or conveyance the estate is limited, either mediately or immediately, to his heirs in fee or in tail, the heirs are words of limitation of the estate and not words of purchase."

This rule has been recognized by this court and applied with considerable strictness to deeds, but less strictly to wills. The earlier decisions of this court favored a stricter and more technical application of the rule. *McFeely v. Moore*, 5 Ohio, 464; *Armstrong v. Zane*, 12 Ohio, 287.

This court, as we think, in the case of *King v. Beck*, 15 Ohio, 559, abandoned the former strict and technical application of the rule in Shelley's case

and adopted the opposite rule of construction, and the decision in this case has stood unquestioned for more than fifty years, and must now be accepted as the settled law of Ohio on the subject. *Preston on Estates*, 271; *Shriver's Lessee v. Lynn*, 2 Hen., 43.

It is a principle of law that where one, by his will, gives to another who is his heir at law, precisely, what that heir would take by descent if his ancestor had died intestate, he will be treated as taking it by descent, instead of by devise.

• The rule in *Shelley's* case is another application of the same legal principle. This court, in *King v. Beck*, *supra*, has taken that view, for it says, at page 562 of said case: "If the estate for life, created in the devisee or donee, is limited precisely as it would descend at law, the rule in *Shelley's* case vests the entire fee in the first devisee or donee."

One is not the "heir" of another in this sense as to the property or rights not *derived* from that other or which never belonged to the other, though he may be the person upon whom descent would be cast upon the death of the other.

It is well settled that if the word "heir" is used by the testator in this latter sense, that is, simply as *designatio personae*, it does not have the effect to vest in the first devisee the entire fee, but he has only a life estate. *Stevenson v. Evans*, 10 Ohio St., 307; *Jones v. Floyd*, 33 Ohio St., 572; *Collier v. Collier*, 3 Ohio St., 369.

The divergence between courts in the interpretation and application of the rule in *Shelley's* case arises largely from their differing views as to what circumstances surrounding the testator and what language in the testament will be allowed to control the meaning of the word "heir," as employed in the

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will so that it shall be interpreted otherwise than in its strict legal sense.

This is well illustrated by the views of this court in reference to the language of the will of William King, in the two cases of *King v. King*, 12 Ohio, 390, and *King v. Beck*, 15 Ohio, 559.

MINSHALL, C. J. The suit below was an action in ejectment brought by the children of Edward A. Peasley, Flora Archer and William E. Peasley, against William Brockschmidt, to recover the possession of some twenty acres of land, claiming to be the owners of it,—situate in Montgomery county. The defendant in his answer denied the averments of the petition; and, in an amended answer, claimed that the plaintiffs were estopped from setting up their claim by a judgment rendered in his favor in a suit to quiet title instituted in 1890, to which they were made parties as “the unknown heirs of Edward A. Peasley.”

The plaintiffs claim title under the will of their grandfather, Aaron M. Peasley, admitted to probate April 29, 1837, he having died in that year. The provisions of the will applicable to the case are as follows:

“I devise to my son Edward A. Peasley all the rest and residue of said tract of land as purchased of said Brown, * * * the whole to the said Edward and his heirs in fee simple * * * I hereby in explanation declare it to be my will that the parcels of land hereinbefore devised to my two sons, Theodore and Edward, is to be to them respectively during their natural lives, but so that they nor either of them cannot in their lifetime dispose of the same for any longer period than during their respective lives, giving each of them only a life estate in the land so devised to

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them, and after their deaths, the property to be to their respective heirs at law in fee simple."

The lands in dispute are covered by the devise. Edward A. Peasley died in December, 1893, leaving the plaintiffs as his only children and heirs.

In 1850 Edward A. Peasley executed a mortgage upon the premises to one Shonenberger; it conveyed the land in fee simple to the mortgagee with covenants of warranty to secure an obligation of the mortgagor to the mortgagee. The obligation not having been performed suit was brought in 1851 to foreclose it. A decree was taken for the sale of the life estate of Peasley in the land, the land was sold to one Sullivan, the sale was confirmed and a deed in fee simple was ordered and made to him by the sheriff. He also had an auditor's deed made upon a sale of the land for delinquent taxes of the same date of his sheriff's deed. He at once took possession of the land, which remained in him and his successors in title down to and including the defendant who purchased and took possession in 1885. The suit was commenced in 1894. The possession of the defendant and his predecessors from 1852 was open, notorious and exclusive and under color of title. These facts are not disputed; and the following questions arise: 1. What estate in the land did Edward A. Peasley take under the will of his father, was it a life estate or a fee simple under the rule in Shelley's case, the will having been made and probated before this rule was abrogated by statute in 1840; and, 2, if under this rule he took a fee simple, have the children on the undisputed facts the right to maintain the action? The court of common pleas rendered judgment for the plaintiffs and the judgment was affirmed on error by the circuit court.

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1. As stated, at the time the will of Aaron M. Peasley was made, the rule in what is known as Shelley's case was still in force as to wills as well as to deeds and other conveyances of land. It was not a rule of construction but of property. The rule is accurately stated by Lane, J., in *McFeely v. Moore*, 5 Ohio, 466, as follows: "Where the ancestor takes a freehold for life, and by the same conveyance, whether a deed or devise, is limited, either mediately or immediately, to his heirs, the word 'heirs' is a word of limitation, not of purchase, and the fee vests in the ancestor," citing 1 Rep., 104. See also, *King v. Beck*, 12 Ohio, 471, and *Armstrong v. Zane*, 12 Ib., 287.

The rule is said to be of feudal origin, and was intended to secure to lords the fruits incident to inheritances; but it was also not without other reasons of considerable force. (*Perrin v. Blake*, Harg. Tracts, 493.) In the limitation of estates it was felt among other things to be a matter of importance that there should be words to which a definite meaning could be attached to avoid the confusion and uncertainty that would otherwise arise, and for the purpose of designating the limitation of a fee simple, the largest estate a freeholder could have in lands, the word "heirs" was adopted, so that when an estate was made to one and his heirs, he acquired the full and absolute dominion over the land, and could dispose of it as he saw fit. The heirs acquired no vested interest in the estate; they had a mere expectancy, or the right to inherit the land at his death if he had not disposed of it in his lifetime by deed or will.

In the application of the rule the intention of the testator as to the estate to be taken by the ancestor has never been a matter of consideration. It is said.

by Justice Blackstone in Perrin and Blake: "I believe there never was an instance when an estate for life was expressly devised to the first taker, that the devisor intended he should have anything more. But if he afterwards gives an estate to the heirs of the tenant for life, it is the consequence or operation of the law that in this case supervenes his intention and vests a remainder in the ancestor: which remainder, if it be immediate, merges his estate for life, and gives him the inheritance in possession; but if mediate only, by reason of some interposing estate, then it vests the inheritance in the tenant for life, as a future interest, to take effect in possession when the interposition is determined. And therefore it has frequently been adjudged, that though an estate be devised to a man for life only, or for life *et non aliter*, or with any other restrictive expressions; yet, if there be afterwards added apt and proper words to create an estate of inheritance in his heirs, or the heirs of his body, the extensive force of the latter words shall overbalance the strictness of the former, and make him tenant in tail or in fee."

In conveyances made by deed the rule was rigidly adhered to, because such instruments were generally made on mature consideration, as well as under the advice of counsel, but it was somewhat relaxed at common law in favor of wills where the same opportunity did not always exist in the case of testators. This relaxation, however, extended only to the use of the word "heirs," for however explicit the purpose of the testator may be shown to have been, from the language of the will, to give only a life estate to the ancestor, if the estate is then limited, mediately or immediately, to heirs, without anything else in the will to show that he had used the

word "heirs" in a limited sense, the devisee took an estate in fee simple. Thus where the estate is limited to the ancestor for life and at his death to his heirs, with a further limitation, that in case he should die without heirs, then over to his brothers and sisters and their heirs, the limitation over was held to show that he had used the word "heirs" not in its technical sense, but as embracing children only; and so the will in such case was construed as if the testator had used the word "children" instead of the word "heirs" in connection with the estate limited to the ancestor. The case of *King v. Beck*, 15 Ohio, 559, determined on a rehearing of the same case, 12 Id., 390, illustrates this rule of construction. There it will be observed, that the devise was to the testator's brother Christian of all his property, to be used by him while he lives, and at his death to go to "his heirs or heirs born in lawful wedlock," and should he die without such heirs, then over to the children of two of his sisters, naming them. This devise over, as the court held, showed that the testator had used the word "heirs" in the sense of children, for if he had used it in its technical sense there could have been no devise over to the children of his two sisters, and the estate would have gone to his heirs general; and although the rule in *Shelley's* case then applied to wills, the brother of the testator was held to have taken a life estate only. One of the four situations pointed out in *Perrin v. Blake* in which the word "heirs" may be construed as a word of purchase, is where the testator has added fresh limitations, and grafted words of inheritance upon the heirs to whom he gives the estate, whereby it appears that these heirs were meant by the testator to be the root of a new heritance—the stock of a new descent; and it will be

observed that the case of *King v. Beck* falls within this category. The judge in delivering the opinion in the case says: "If the estate for life created in the devisee or donee is limited precisely as it would descend at law, the rule in Shelley's case vests the *entire fee* in the first devisee or donee." Such is the fact in the case before us and distinguishes that case from this. The testator first gives to his son Edward an estate for life in the land, and at his death it is to go to his heirs. There is no devise over in case he should die without heirs, nor is there anything in the will to show that he used the word "heirs" in any other than the usual sense in law, except that he gave a life estate to his son, which as we have already shown, in no way affects the application of the rule. On the death of Edward the property is to go precisely as it would at law—to his heirs. It therefore follows that under the will of his father, Edward took a fee simple estate in the land devised to him. —————!!

2. We come then to the question whether the action of the plaintiffs can be maintained under the circumstances of the case. We think not. The sheriff's deed, notwithstanding the fact that a life estate had been ordered sold, was made in pursuance of the order of court, and conveyed to the purchaser the legal title in fee simple; and, without a reformation, the plaintiffs cannot recover the land against one having the legal title. They have but an equity at most. They did not ask for a reformation of the deed, and a recovery on it as reformed; and, had they done so, the defendant might have well plead the statute of limitations to such an action. The deed was executed in 1852, and the purchaser then went into possession, and he and his successors in title

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down to and including the defendant, have ever since been in the open and notorious adverse possession of the land claiming title in fee simple.

The right to reform the deed accrued to the mortgagor on the execution of the deed, for it deprived him of his reversionary estate in the land, which he might, otherwise, have disposed of for value, although it could only take effect in possession on the termination of his own life. One who takes in the quality of heir takes no new estate in the land; he simply succeeds to the estate of his ancestor. This is the legal distinction between an heir and a purchaser. When Edward Peasley died in 1893, his heirs simply stepped into his shoes with such rights in regard to the land as he had at his death. They were his real representatives, and if his right to recover the land or reform the deed in any form of action was barred, they were likewise precluded from doing so by the same bar. This makes it unnecessary for us to consider any of the other grounds of defense relied on by the defendant below.

Judgment reversed; and judgment on the undisputed facts for the defendant below.

WILLIAMS, BURKET, SPEAR and SHAUCK, JJ., concur; DAVIS, J., absent.

National Home for Disabled Volunteers v. Overholser.

**THE NATIONAL HOME FOR DISABLED VOLUNTEER
SOLDIERS v. OVERHOLSER.**

Power of common pleas court to set aside its judgment—May do so by consent of parties, when.

The court of common pleas having by statute authority to set aside its judgments at a subsequent term, such judgments may be set aside by the consent of both parties without statement of the grounds for such action.

(Decided May 7, 1901.)

Error to the Circuit Court of Montgomery county.

Upon the trial of the action in the court of common pleas, in which Overholser was plaintiff and the National Home defendant, the jury returned a verdict in favor of the plaintiff on the 25th day of November, 1898. Judgment in favor of the plaintiff immediately followed the verdict. Within three days, as required by statute, the defendant there filed a motion for a new trial. This motion was not disposed of by the court until the 27th day of March, 1899. On the 25th day of March, 1899, as appears from the record, by consent of the parties plaintiff and defendant, the judgment which had been entered in the previous November, and at a former term of the court, was set aside, the order being expressly made by the consent of the parties. Thereupon on the 27th day of March, the court upon consideration of the motion for a new trial, overruled the same and rendered judgment in favor of the plaintiff for the amount of the verdict, to which ruling the defendant excepted and took a bill of exceptions which was filed May 10, 1899. On the 5th of June, 1899, plaintiff in error here filed its petition in error in the circuit court for the reversal of

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the judgment of the court of common pleas. On the 13th day of June, 1899, as appears from the record of the circuit court, that court, finding that it was without jurisdiction to hear and determine the cause for the reason that the petition in error was not filed within four months after the rendition of the judgment, ordered that the petition in error be dismissed and to this order plaintiff in error excepted. To reverse that order of dismissal is the object of this petition in error.

Patterson & Murphy and McMahon & McMahon, for plaintiff in error, cited the following authorities: *Lambert v. Mustard*, 18 Ohio St., 419; *Elliot v. Plator*, 43 Ohio St., 198; *Benedict v. State*, 44 Ohio St., 679; *Jarrett, In re est. of*, 42 Ohio St., 199; Secs. 5354 and 5357, Rev. Stat.; *Reynolds v. Stansbury*, 20 Ohio, 344; *Huntington v. Finch*, 3 Ohio St., 445.

Young & Young, for defendant in error, cited the following authorities: *Thatcher v. Dickinson*, 2 Circ. Dec., 82; 3 C. C. R., 144; *Watson v. Paine*, 25 Ohio St., 340; *Wellman v. Wellman*, 6 Circ. Dec., 61 (9 R., 72); *Exposition Building & Loan Co. v. Spiegel*, 4 Circ. Dec., 474 (12 R., 761); *Botkin v. Pickaway Co.*, 1 Ohio, 375; *McVickar v. Heirs of Ludlow*, 2 Ohio, 246; *Critchfield v. Porter*, 3 Ohio, 518; *Landon v. Reid*, 10 Ohio, 202; *Greene v. Dodge*, 3 Ohio, 486; *Huntington v. Finch*, 3 Ohio St., 445; *Commissioners v. Cambridge*, 3 Circ. Dec., 669; 7 C. C. R., 72; *Hettrick v. Wilson*, 12 Ohio St., 136; *Braden v. Hoffman*, 46 Ohio St., 639; *Frazier v. Williams*, 24 Ohio St., 625; *Ralston v. Wells*, 49 Ohio St., 298; 1 Black on Judgments, Sec. 306; *Bronson v. Schulten*, 104 U. S., 410; *Allen v. Wilson*, 21 Fed. Rep., 881; *Egan v.*

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Sengpiel, 46 Wis., 703; *Donnell v. Hamilton*, 77 Ala., 610; *Little Rock v. Bullock*, 6 Ark., 282; *Anderson v. Thompson*, 7 Lea., 259; Black on Judgments, *supra*, Sec. 306; *Young v. Shallenberger*, 53 Ohio St., 291; *Wasson v. Heffner*, 13 Ohio St., 573; *Gilliland v. Sellers, Admr.*, 2 Ohio St., 223; *Dayton & Western R. R. Co. v. Marshall*, 11 Ohio St., 497; Note 2, *Beach v. Botsford*, 40 Am. Dec., 45.

BY THE COURT:

The circuit court acted upon its own motion, and apparently upon the impression that the court of common pleas on March 25, 1899, was without jurisdiction to set aside the judgment which it had rendered in the 25th of November, 1898, although the parties consented thereto. That view of the subject is erroneous. It was not an agreement to confer upon the court of common pleas jurisdiction of a subject matter. That court is vested by statute with authority to set aside its judgments after the terms at which they are rendered for specified reasons, and when counsel consented that that jurisdiction should be exercised in this case, they did no more than to waive the allegation of a statutory ground for such action. That judgment having been set aside, the judgment of March 27, 1899, upon the overruling of the motion for a new trial, is the only final judgment of the court of common pleas in the case, and the petition in error having been filed within four months of the rendition of that judgment it was the duty of the circuit court to consider it.

The order of the circuit court dismissing the petition in error is reversed and the cause remanded to that court for further proceedings.

Palmer v. Darby.

PALMER v. DARBY.

Action to recover damages for usurpation of office—Only damages recoverable are emoluments or salary of office during time unlawfully withheld.

In an action to recover damages for the usurpation of an office, the only damages recoverable are the emoluments or salary pertaining to the office during the time it was unlawfully withheld from the rightful claimant.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Lucas county.

The plaintiff sued the defendant in the court of common pleas of Lucas county alleging that on the 12th day of April, 1884, he was a resident of the village of Wauseon and eligible to the office of councilman in that village; that on and prior to said date while the plaintiff was a duly appointed, qualified and acting councilman of said village of Wauseon, the defendant wrongfully, oppressively and maliciously, without cause, usurped plaintiff's said office of councilman, and wrongfully, unlawfully and maliciously, without cause or reason, deprived and kept the plaintiff out of the possession of said office until the 5th day of November, 1894; that thereafter such proceedings were had in the circuit court of Fulton county and in the Supreme Court of Ohio, that it was adjudged that the defendant was not entitled to the said office, and that he had usurped the same, and the defendant was accordingly ousted therefrom and the plaintiff was restored to said office; and the plaintiff also alleged that by reason of the wrongful and malicious usurpation of said office of councilman by the defendant, the plaintiff was obliged to employ

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attorneys and was put to great expense of time and money in ousting the defendant from said office, to the damage of plaintiff \$1,187.56, no part of which has been paid by the defendant. The plaintiff attached to his petition an itemized account of said damages; and prayed for judgment against the defendant in the sum of \$1,187.56, with interest from October 21, 1894, for costs and for all further relief. The defendant demurred to the petition on the ground that the same did not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiff. The court of common pleas sustained the demurrer, and, the defendant not pleading further, rendered judgment for the defendant. On a petition in error the circuit court affirmed the judgment of the court of common pleas, and this proceeding in error is prosecuted to reverse the said judgment of the circuit court.

Hurd, Brumback & Thatcher and Orville S. Brumback, for plaintiff in error.

The case is prosecuted on the strength of the section of the Revised Statutes, Sec. 6778.

That the rule of the Common Law thus stated is correct cannot be doubted. The form of action in such cases was on the assize, or an action for money had and received. *Boyder v. Dodsworth*, 6 Term Rep., 681; *Lightly v. Clouston*, 1 Taunt., 112; *Allen v. McKean*, 1 Sumner, 276; *Douglass v. State*, 31 Ind., 429; *Auditors v. Benoit*, 20 Mich., 176; *Bier v. Gorrell*, 30 W. Va., 95; *Mayfield v. Moore*, 53 Ill., 428.

We make the very pertinent inquiry: *What was the purpose of the statute, if it did not change the rule of the common law? The whole action of the Legislature under such a construction was nugatory and absolutely useless.*

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A wrongful intrusion into an office is a tort. *People ex rel. v. Miller*, 24 Mich., 458.

The case is closely assimilated to those in Ohio where counsel fees are allowed in actions sounding in tort by way of compensatory damages. *Finney v. Smith*, 31 Ohio St., 529; *Stevenson v. Morris*, 37 Ohio St., 10; *Peckham Iron Co. v. Harper*, 41 Ohio St., 100.

The undoubted purpose of the statute is to make good the loss to the party ousted, by the wrongful usurpation of the office.

The usurper takes the office with full knowledge of the rights of the party ousted. He voluntarily assumes the burden of making good all his loss and damage. He knows when he usurps the office his adversary's only relief is to resort to law and incur lawyer's fees, court costs, etc., to obtain the office from which he has been wrongfully ousted. It would seem remarkable if the statute was not intended to make good this loss and damage.

How far a recovery of salary comes short of doing justice is seen in the case at bar, where there is no salary attached to the office of councilman.

If such is the law, the rightful occupant of the office had better, and doubtless will, quietly yield up his office rather than undergo a thousand dollars or more expense to maintain his right to the office. *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417.

It is true a statute affixing a penalty or liability will be fairly but strictly construed; but the same rule applies in affixing the liability of sureties upon an injunction bond. *Roberts v. Dust*, 4 Ohio St., 503; *Williamson v. Hall*, 1 Ohio St., 190; *Hall v. Williamson*, 9 Ohio St., 17; *Smith v. Huesman*, 30 Ohio St., 662; *Krug v. Bishop*, 44 Ohio St., 221.

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And it is settled in Ohio that fees and expenses necessarily incurred in obtaining a dissolution of the injunction may be recovered on the bond. *Noble v. Arnold*, 23 Ohio St., 264; *Riddle v. Cheadle*, 25 Ohio St., 278.

The language of the liability of the surety prescribed by statute is substantially the same as the liability prescribed by section 6778 in question, viz.: binding him to pay "the damages sustained," etc.

To the same effect is the liability on an attachment bond construed in connection with the statute governing such bonds. The compensatory damages recoverable include attorney fees. *Alexander v. Jacoby*, 23 Ohio St., 358; *Roberts v. Mason*, 10 Ohio St., 278; *Railroad Co. v. Bartram*, 11 Ohio St., 457; *Pope v. Pollock*, 46 Ohio St., 367; *Smith v. Railway Co.*, 23 Ohio St., 10.

Where it is alleged that an office was wrongfully and maliciously usurped and the rightful incumbent ousted therefrom, requiring legal proceedings to be prosecuted through all the courts of Ohio for his removal, it certainly makes a case involving wilful malice, oppression and vexation. *State v. Kromer*, 38 Wis., 547; *Douglass v. State*, 31 Ind., 429; *Kreitz v. Behrenmeyer*, 149 Ill., 496.

Applying this same principle here, is it not wise to construe the statute so as to make it a menace to any one usurping or wrongfully retaining a public office; in other words, by requiring him to pay the expense of counsel fees which he has unjustly and unlawfully caused the rightful occupant of the office to incur?

As said in a case where the usurper of an office was held liable for the salary. *Sigur v. Crenshaw*, 10 La. Ann., 297; *Gates v. Toledo*, 57 Ohio St., 105.

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The second amended petition pleads that Darby "wrongfully, oppressively and maliciously, without cause, usurped plaintiff's said office of councilman, and wrongfully, unlawfully and maliciously, without cause or reason, deprived and kept this plaintiff out of said office."

We fail to see wherein further facts could be alleged to make the action of Darby malicious. The character of his action in usurping the office is a fact, being a question of purpose and intent on his part, to be alleged the same as any other fact.

There is no presumption about it. It is purely a question of fact to be alleged and proven whether in committing the tort of usurping the office it was done with "actual malice, oppression or vexation."

To plead that such an ingredient of malice and oppression exists is to plead a fact. *Sutor v. Wood*, 76 Tex., 403; 4 Enc. Pl. & P., 473; *VanIngen v. Newton*, 12 Dec. Re., 732; 1 Disn., 482.

It would be most improper to plead the evidence by which such malice is to be established. *Work v. Mitchell*, 12 Dec. (Re.), 761; 1 Disn., 506; *Waller v. Robinson*, 2 Dec. (Re.), 16 (1 W. L. M., 90).

Malice being a fact as to a mental state, is to be plead like any other like fact, *e. g.*, intention. *Bartholomew v. Bentley*, 15 Ohio, 660; *Bank v. Beebe*, 6 Ohio, 497; 1 Bates Pl., 114.

It is like a replevin case where it is sufficient to allege ownership of the goods, not the evidence to show ownership. *Wilmot v. Lyon*, 7 Circ. Dec., 394; 11 C. R., 238.

Counsel are simply confused in attempting to draw a distinction in this case relative to malice not being presumed. 1 Kinkead Code Pl., 722; *Klein v. Thompson*, 19 Ohio St., 569.

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It follows that our first petition may have been good, although no malice was expressly alleged, since the act of usurping the office was unlawful and so determined in the *quo warranto* case, *McCracken v. West*, 17 Ohio St., 16; *Bartholomew v. Bentley*, 15 Ohio, 660.

The case at bar is closely assimilated to a case of malicious prosecution, where malice is plead in the same manner as we have done in the case at bar, and where under proof to sustain the allegations, attorney fees can be recovered. 1 Kinkead Code Pl., 751.

The damages sought to be recovered were consequential and so proximately caused by the wrongdoing as to render the defendant liable therefor. 1 Sedgwick on Damages, Sec. 111.

We insist the reasonable expense of employing attorneys and the other expenses sustained in redressing the injury is as proper an element of damages in this case as is the expense sustained in the employment of a physician and purchase of medicines in a personal injury suit. Sedgwick on Damages, Sec. 217.

Nor are we claiming attorney fees in this "action by way of exemplary damages," as counsel argue. (Deft's Brief 3-4.) Upon the contrary, the attorney fees are claimed by way of compensatory damages, well established, as such by the decisions of this court. *Finney v. Smith*, 31 Ohio St., 529; *Railroad Co. v. Bartram*, 11 Ohio St., 457.

An act which if innocently done would not constitute an injury in law, if maliciously or negligently done and damages result, may afford ground for recovery in damages. 8 Am. & Eng. Ency. Law, (2nd Ed.), 549.

Of like character is the claim that the word "damages" used in section 6778 means salary or emoluments of office. *Grogan v. Garrison*, 27 Ohio St., 50.

To say the word "damages" had acquired a fixed legal signification of salary or emoluments of an office only, is to beg the question. The word has no such fixed legal signification. On the contrary, the fixed legal meaning of the word "damages" is, as stated by Bouvier:

"The indemnity recoverable by a person who has sustained an injury, either in his person, property or relative rights, through the act or default of another."

Counsel assert that statutes similar to ours "have been passed in New York, California, Michigan, Louisiana, Indiana and North Carolina."

We do not know where they get authority for this statement. We have been unable to find any similar statute except in New York and Indiana.

In *Nichols v. McLean*, 101 N. Y., 526, such a statute is referred to, but in none of the other cases cited is any statute except in New York and Indiana.

While it is true that in Ohio attorney fees are not ordinarily recoverable, *yet it is well settled that where in an action of tort the ingredient of fraud, malice or insult is involved in defendant's conduct, attorney fees are not against public policy, but on the contrary are awarded as compensatory damages.* It follows that the Wisconsin case (38 Wis., 547), comes nearer to the case at bar,—since attorney fees were there claimed—than any other case cited.

The attempt to distinguish this case on the ground that the attorney fees and other expenses sought to be recovered were sustained in the *quo warranto* case, and not directly from the usurpation of the office, is not well founded. *Kelly v. McKibben*, 54 Cal., 195.

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This case is for the recovery of damages for the malicious usurpation (conversion) of the office. 1 Sedgwick on Damages, Sec. 216; *Merrill v. How*, 24 Me., 126; *Boomer v. Flagler*, 51 N. Y. Super., 208; *Sprague v. McKinzie*, 63 Barb., 60; *Miller v. Garling*, 12 How. Pr., 203.

Doyle & Lewis, for defendant in error.

Counsel have the impression, evidently, that they may make a case for exemplary damages and hence recover attorney fees where there are no actual damages, as there are none in this case. The rule, however, is that there must be actual damages alleged and proved, or legally presumed, before the question of exemplary damages can be considered. This rule will be found stated, with the authorities to support it, in 12 Am. and Eng. Ency. Law (2 ed., pp. 29 and 30). In this case, there being no emoluments of any kind, even nominal damages are not recoverable.

The claim is made under section 6778, Revised Statutes. Well, one very manifest purpose of the statute is to limit the time within which the action can be brought to one year after the date of the judgment of ouster. But counsel must know that there are a great many statutes which are merely declaratory of the common law, and it will hardly do now, in this state, to insist upon a forced construction of a statute which declares a right which existed at common law.

The "damages" which a party might recover for being unlawfully kept out of an office to which he was entitled, had a very well known and established rule at the time this statute was passed. "Damages" meant the salary or emoluments of the office, and the authorities in Ohio well sustain the

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proposition that the General Assembly used the word "damages" with that well defined meaning. *Gray v. Askew*, 3 Ohio, 466; *Turney v. Yeoman*, 14 Ohio, 207; *Grogan v. Garrison*, 27 Ohio St., 50; *Bank v. Railroad Co.*, 20 Ohio St., 259.

Statutes similar to ours, in most cases indential, have passed in New York, California, Michigan, Indiana, Louisiana and North Carolina. Under these statutes (like our section 6778) many cases have arisen, and the rule of "damages" has been limited to the recovery of the emoluments of the office received by the intruder. In none of them have attorney fees or expenses incurred in recovering the office been allowed. *Nichols v. McLean*, 101 N. Y., 526; *People v. Nolan*, 101 N. Y., 539; *Kessel v. Zeiser*, 102 N. Y., 114.

The statute in New York is quoted in the opinion in 101 N. Y., at page 536, and is that the rightful officer might recover "damages sustained by reason of the usurpation of the defendant." *Stoddard v. Williams*, 65 Cal., 472; *People v. Miller*, 24 Mich., 458; *Glascock v. Lyons*, 20 Ind., 1; *Douglas v. State*, 31 Ind., 429; *State v. Tate*, 70 N. C., 161; *Bier v. Gorrell*, 30 W. Va., 95; *United States v. Addison*, 73 U. S. (6 Wall.), 291; *Mayfield v. Moore*, 53 Ill., 428; *Sigur v. Crenshaw*, 10 La. Ann., 297; *Petit v. Rousseau*, 15 La. Ann., 239; Cooley on Torts, 351; Throop on Public Officers, Secs. 256, 521, 522, 523, 663 and 786.

BY THE COURT:

Section 6778 of the Revised Statutes provides that, where one recovers a judgment of ouster in *quo warranto* proceedings against the usurper of an office, "such person may, at any time within one year after the date of such judgment, bring an action against

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the party ousted, and recover the damages he sustained by reason of such usurpation." At the time this statute was enacted, the measure of damages in such an action, as understood and applied at common law, was the salary or emoluments pertaining to the office during the time it was unlawfully held by the intruder; and the legal presumption is that the legislature used the phrase, "the damages he sustained by reason of such usurpation," in this fixed legal signification. *Turney v. Yeoman*, 14 Ohio, 218. *Grogan v. Garrison*, 27 Ohio St., 63. Therefore, in the absence of any express change in the rule of damages, the statute must be interpreted as authorizing the recovery of the salary or emoluments of the usurped office, as damages, but limiting the action to one year after the date of such judgment of ouster. The office has no salary and no emoluments attached. The petition, therefore, does not state a cause of action, and the judgment of the circuit court is

Affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

HURST ET AL. v. FISHER ET AL.

*Land bid in at sheriff's sale—By one who served as appraiser—
And prevented other bidders—Such sale may be set aside on
petition of judgment debtors—Even though purchase money
paid into court and deed delivered.*

Where land has been bid in at sheriff's sale, by one who, unknown to the judgment debtor, owner of the land, had served as appraiser, and it is shown besides, that such bidder undertook to prevent others from bidding at the sale, and that the land brought less than its probable value, such sale will, on the petition of the judgment debtor, be set aside and a new sale ordered even though the purchase money has been paid into court and distributed, a deed delivered by the sheriff, and no guaranty is afforded that the land will bring more at a re-sale.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Ashland county.

The action below was commenced by petition in the common pleas to set aside a sale of lands by the sheriff. The case was tried on appeal in the circuit court, where findings and judgment were rendered for the defendants. It appears from the record that the defendant in error, George Fisher, was one of the freeholders selected by the sheriff as appraisers, and that he, with his father-in-law and brother-in-law appraised the land; that it was sold by the sheriff upon that appraisement and was brought by said Fisher at that sale. The evidence introduced by plaintiffs was to the effect that Fisher contemplated being a purchaser before he was called as an appraiser; that he endeavored to prevent, and probably did prevent some others from bidding, and that he made an ar-

rangement with a prospective bidder to share the purchase with him. Also that the land sold for less than its real value, and no evidence was offered by defendants in contradiction of either of these facts, nor did Fisher go upon the stand at all to testify. The sale was reported to the court and approved, and the purchase money paid in and distributed to lien-holders, and a sheriff's deed made to Fisher, but the owners of the land (the judgment debtors) did not have notice at that time, nor until just before the commencement of the present suit to set aside the sale, that the purchaser, Fisher, was an appraiser on whose appraisal the land was sold, nor of the facts respecting his efforts to prevent competition at the sale.

Wm. T. Devor and E. H. Noel, for plaintiffs in error.

H. A. Mykrantz, for defendants in error.

BY THE COURT:

Where it appears, as in the present case, that the successful bidder at a sheriff's sale of land was one of the appraisers on whose appraisal the land was valued for sale; that the purchaser attempted to discourage other bidders at the sale and prevent them from bidding; that the land probably did not bring its real value, and that the owners (the judgment debtors) were not aware of the facts as stated until after confirmation of the sale, execution of a deed and distribution of the purchase money, a proper enforcement of the policy expressed in section 5404, Revised Statutes, requires that the sale be set aside and the land again offered for sale, even though no guaranty is offered that the land will bring more. The

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remedy may prove somewhat harsh upon the purchaser, but if so, he has only himself to blame for the dilemma in which he finds himself placed.

Judgment reversed and judgment for plaintiff in error.

All concur.

THE STATE EX REL. ATTORNEY GENERAL v. HOGAN
ET AL.

Removal of public officer—For specified causes—Facts must be stated that are relied on for removal—Right of officer to be heard—Misconstruction of statute not evidence of incompetency—Proceeding in mandamus should be employed, when—Civil service commissioners—Removal of by mayor.

1. When a public officer may be removed for specified causes, such facts must be stated as in judgment of law constitute the cause relied on, and an opportunity afforded the officer to be heard, before he can be legally removed.
2. The misconstruction of a statute, about which there may be an honest difference of opinion, is not such evidence of incompetency, or misconduct, in the officer as to warrant his removal on either of these grounds.
3. The proper remedy in such case is a proceeding in mandamus to compel him to act in accordance with the required construction or to show cause why he does not.

(Decided May 14, 1901.)

IN QUO WARRANTO.

J. M. Sheets, Attorney General; Gilbert H. Stewart; E. B. Kinkad; Geo. B. Okey; E. B. Dillon and Henry Gumble, for plaintiff.

The act of April 14, 1900, entitled, "An act to regulate and improve the civil service in certain depart-

ments within cities of the first grade of the second class," 94 O. L., 603; Bates Rev. Stat., Sec. 1545-165a, provides:

"Section 1. * * * The mayor may remove any commissioner for incompetence, neglect of duty, malfeasance in office, habitual drunkenness or gross immorality; and any manifest failure on the part of any commissioner to enforce the provisions of this act, according to its true intent and purpose, shall be deemed incompetency."

No proposition of law is more firmly settled in this state than that the power of removal from office can not be exercised "arbitrarily, but only upon complaint, and after a hearing had, in which the officer is afforded an opportunity to refute the case made against him." *State ex rel. v. Sullivan*, 58 Ohio St., 504.

The court has been so recently over the ground that it seems a work of supererogation to do more than to cite the cases, where, in *State ex rel. v. Hawkins*, 44 Ohio St., 98; *State ex rel. v. Bryson*, 44 Ohio St., 457; *State ex rel. v. McLain*, 58 Ohio St., 313, and *State ex rel. v. Sullivan*, 58 Ohio St., 504, the exhaustive opinions of Judges Minshall, Williams and Spear leave nothing to be added upon the subject.

If mayor Hinkle had afforded the members of the civil service commission an opportunity to refute the charges made against them, if they embodied facts which, in judgment of law constituted such official misconduct as the civil service act prescribes as grounds for removal, and evidence had been adduced on the hearing tending to establish them, his action might have been final and conclusive.

The members of the commission were charged and the mayor found that they were guilty of "gross offi-

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cial misconduct and incompetency and neglect of duty," and that finding was made a matter of public official record.

The mere fact that the character of the charges were not such as to reflect upon the integrity of the members can not be claimed to dispense with or create an exception to the rule requiring an opportunity to be afforded for a refutation of the accusation. The character of the charges can not affect the well established principle.

The public record will always show that these officers were guilty. The record of a sentence convicting them of gross official misconduct, and incompetency and neglect of duty stares them in the face for all coming time.

It will be seen by reference to Mayor Hinkle's order of removal that he found that it was known to him that the charges and specifications were true and that "no investigation or hearing, and no exercise of judicial power," were necessary.

We feel that we might well stop at this point, and rest our case upon the single proposition that the action of the mayor was void because no opportunity was afforded the removed officers for a hearing, but believing that possibly the court might desire to look further into the case, we will present, briefly, our views on the other questions.

It is provided in the civil service act—

"Sec. 5. In case of any vacancy in the classified service of said city, notice shall be given the commission by the appointing power of said vacancy, and thereupon the commission shall certify in writing to the appointing power, the names, addresses and grades of the candidates, not exceeding three in number, for any such vacancy, whose names shall stand

highest on the appropriate register, and it shall then be the duty of the appointing power to appoint on probation, to fill such vacancy, one of the said candidates whose name shall have been so certified."

The offense, in a nut shell, with which the members of the civil service commission were charged by the director of public safety was that in response to his requisition they transmitted to him but a single name, when they should have sent him more than one, and that that had been their practice with respect to his predecessor in office.

It is obvious that the construction placed upon section 5 of the act by the members of the commission was done so conscientiously and with the deep conviction that it was the true one.

The question then arises whether the charges were of a character that, *in judgment of law*, constituted incompetence, neglect of duty, malfeasance in office, habitual drunkenness, or gross immorality or manifest failure to enforce the provisions of the act according to its true intent and purpose, they being the grounds for removal provided for in section 1 of the act.

A case directly in point is that of the *State ex rel. v. Roll*, 1 Dec. (Re.), 284; 7 W. L. J., 121, noted as well on account of the eminent men who were of counsel as of those whose election was involved in its hearing.

But we insist that the construction placed upon section 5 by the commissioners was proper.

While it is true that under section 5 of the act, the commission is required to certify "*the names, addresses and grades of the candidates* (using the plural), not exceeding three in number," and which upon hasty reading would seem to be free from ambiguity, and to mean more than one name, yet when

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the object, purpose and policy of the statute are considered, it becomes apparent that the letter of the act must be subordinated to the intent.

The spirit, the reason, the principle, of a law overshadows the letter of the law. Bishop, Written Laws, Sec. 92.

The statute of frauds has been the subject of fierce litigation, of ingenious arguments and elaborate discussions. Every syllable of it, said a great judge, is worth a subsidy. But if it had been construed and enforced according to its strict letter, it would have promoted more frauds than it prevented.

"In construing statutes, we should look to the real object and intention of the law makers, as gathered from an examination and comparison of the context of the whole act—its spirit and import." *People v. Canal Commissioners*, 3 Scam., 153; *United States v. Kirby*, 7 Wall., 482; Sutherland on Statutory Construction, Sec. 218.

Language must be restrained to the sense in which it was used by the legislature in adopting the law. *Goodall v. Brewing Co.*, 56 Ohio St., 257.

The great object in the construction of statutes is to ascertain the intent and carry it out. The court does not make the law, but decides it. *Ludlow v. Johnston*, 3 Ohio, 553; *Pancoast v. Ruffin*, 1 Ohio, 381; *Beaver v. Blind Asylum*, 19 Ohio St., 97.

The intention may be collected from the cause of necessity of the act, and a thing within the letter is not within the statute unless within its intention. *Burgett v. Burgett*, 1 Ohio, 469.

The object of a statute and the mischief against which it was designed to guard will be looked to. 2 Ohio Digest, p. 2145, par. 72; *Henry v. Trustees*, 48 Ohio St., 671; *Tracy v. Card*, 2 Ohio St., 431.

The ascertainment of the true intention is the cardinal rule, or rather the end and object, of all construction. Endlich on Interpretation of Statutes, Sec. 295.

It is impossible to resist the conviction that, in enacting the Columbus civil service law, the highest efficiency in the classified service of the city was not only the chief, but the sole object of its enactment.

An attempt had been made in what is familiarly known as the "Charter Law," of the city of Columbus (Bates' Stat., Sec. 1545-136) to establish the merit system in the police and fire departments of the city, but in its practical enforcement it had wholly failed in the purpose for which it was enacted. The main reason for its failure was, that its execution was left in the hands of the appointing power.

The evils, then, which confronted the general assembly upon the introduction of the civil service bill, were:

1. The inefficiency resulting from partisan control of municipal affairs.
2. The failure of the attempt in the charter law, to correct those evils.

In the light of these evils, it is fair to assume that it was the intent of the legislature, in enacting the civil service law, to eradicate, root and branch, the possibility, in the remotest degree, of partisan politics controlling in municipal offices.

If an adherence to the strict letter of the act destroys the design and purpose of its enactment, then, as we have shown, the letter must give way and be subordinated to the intent.

Any construction of the act other than the one placed upon it by the civil service commission is absolutely destructive of its obvious spirit and intent.

If the commission are required to certify more than one name to the appointing power, there is a possibility that the evils of partisan control will continue to exist.

But it is claimed that the construction placed upon the act by the commission takes away from the heads of the city departments the appointing power conferred upon them by the Charter law (Bates' Rev. Stat., Sec. 1545-111). That is not strictly true. It takes from them the power of selection only. They still have the power to appoint, and to appoint only on probation. We contend that it was the very object and purpose of the civil service act to take from the heads of departments the power of selection. That act was passed seven years after the "Charter Law." It is the later enactment, and in so far as it is conflicting with it, it repeals it by implication. *State v. Halliday*, 63 Ohio St., 165.

Luke G. Byrne; Franklin Rubrecht and Roy L. Wildermuth, for defendants.

On April 14, 1900, the act "to regulate and improve the civil service *in certain departments* within cities of the first grade of the second class" was enacted. This act is found in 94 Ohio Local Laws, 603.

Sec. 1 provides "That in cities of the first grade of the second class (Columbus) the mayor shall, within thirty days after the passage of this act, appoint four persons to constitute a civil service commission. * * * They shall serve, one until the expiration of four years, one until the expiration of three years, one until the expiration of two years, and one until the expiration of one year, from the first day of September, 1900, and until their respective successors are appointed and qualified; and in the year 1901 and in

every year thereafter, the mayor of such cities shall appoint, in the month of August, one person to serve as such commissioner for four years from the first day of September and until his successor is appointed and qualified." * * * The mayor may remove any commissioner for incompetency, neglect of duty, malfeasance in office, habitual drunkenness, or gross immorality; and any manifest failure on the part of any commissioner to enforce the provisions of this act, according to its true intent and purpose, shall be deemed incompetency, *and when the removal of any commissioner is made*, the mayor shall file a written statement of the cause, or causes, for such removal with the clerk of said commission and the same shall be recorded in the records hereinafter provided."

Sec. 3 of this act [Bates' Rev. Stat., Sec. 1545-165c] provides that "The said commission shall have power to and shall forthwith make rules to carry out the purposes of this act, and for regulating examinations and appointments to fill any and all vacancies in the classified service of such city, in accordance with its provisions."

Sec. 9 of this act [Bates' Rev. Stat., Sec. 1545-165i] provides that "Any person who shall wilfully violate any of the provisions of this act, or any rule promulgated in accordance with the provisions thereof, shall be guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine of not less than fifty dollars, * * * or by imprisonment for a term not exceeding six months, or by both such fine and imprisonment, in the discretion of the court."

Sec. 10. provides that "all acts and parts of acts, so far as *inconsistent herewith*, are hereby repealed." It is a proposition, which we think will not be seriously disputed, that the two enactments, the charter

law, and the civil service commission law must be construed together. The civil service law is not more than it pretends to be in its title, "A bill to regulate and improve the civil service *in certain departments* within the city."

By it, the legislature did not intend to curtail or abridge the appointing powers *of the mayor*, as conferred upon him under the charter law. (Paragraphs 99, 103, 112, 114 and 117 of Columbus Charter Law, section 1545-89, *et seq.*, Rev. Stat.) It did enlarge his appointing powers to constitute a civil service commission, which are not provided for in the charter law. In most instances the power to appoint an officer implies the right to remove him, where the law is silent in this regard. But in the case before us neither law is silent upon the mayor's power to remove any appointee of his own. Under the charter law "he may remove *at his discretion* any director or other officer, or employee appointed by him," and in the civil service law, this power is not attempted to be denied him. It is true, that in the civil service law certain grounds are set out upon which the mayor *may remove* a commissioner, to-wit: incompetency, neglect of duty, malfeasance in office, habitual drunkenness or gross immorality, yet these grounds are only cumulative, and must be read in the light of the powers of removal conferred upon the mayor by the charter law, as a matter in his sole discretion. No provision is made for a trial or hearing, and the order to file a written statement of the cause or causes for such removal with the clerk is not a condition precedent to the removal by the mayor. The words used are "*when* the removal is made the charges shall be filed," etc.

By the terms of the act itself the filing of said charges is to be made simultaneously with the removal, or subsequently thereto, *and not before the removal is made*, and for the sole purpose of preserving a record thereof. This is the only importance which should be attached to this provision of the civil service law.

The court will observe that a director or the head of any of the four departments, may remove or suspend any officer or employe of such department "by written order giving his reasons therefor." No such condition in either law is prescribed for the mayor.

The civil service commission is not and was not intended to affect or control the appointments by the mayor. The civil service commission is created to affect appointments coming through the heads of departments only. It was not intended by the civil service law to take away the appointing powers of the directors. It was to provide a means whereby the fitness of applicants for positions might be ascertained before their appointment by the director. It is the duty of the commission to examine applicants for positions or appointments, to be filled and made only by the several directors, as to their qualifications. The commission is an auxiliary only, to the four heads of departments. In his discretion the mayor may remove either head of the department at any time, and it would seem a preposterous proposition to claim that he could not remove, under the same power, an auxiliary to the directors which is likewise appointed by him. That power to remove was conferred upon him by the charter law. The legislature recognized it when it passed the civil service law, and it did not in express terms, or by implication, attempt to take that power away from him. The mantle of importance

which the members of the old board have flung about themselves, must have been obtained from some source, wholly outside of the law creating it. The mayor is now, as he was before, the recognized, responsible head of our municipal government. Under the charter law he has a right to remove his appointees *at his discretion*. Under the civil service law *he may* remove for incompetency, neglect of duty, drunkenness, etc., and it is still left to his discretion, for terms are not imposed by this law. Had the legislature intended to have taken away this discretion, it would have been an easy matter to have done so. They could have provided for notices, hearings, trials, tribunals, and evidence, but they did not.

We hardly believe that the decision in *State v. Sullivan*, 58 Ohio St., 504, under the Cincinnati statute, will be seriously urged as applicable to a removal under the Columbus statute.

The members of the commission were defying the law; they adopted rule 5 in defiance of the civil service law; they assumed to be greater in authority than the legislature itself; they refused in writing to comply with the law and authorized their secretary to communicate that refusal to the mayor, which he did. They knew that the legislature had defined such conduct to be "incompetency," and they knew that even under the civil service law the mayor might remove them for incompetency. The mayor did not have to go to some court for a definition of "incompetency," for the legislature had taken the pains to define it, in the act creating the commission, in these words: "And any manifest failure on the part of any commissioner to enforce the provisions of this act, according to its true intent and purpose, shall be deemed incompetency." Under such circumstances

it became the duty of the mayor to remove immediately, and if he should have failed to have so done, he himself would have been guilty of a neglect of his own duty as mayor, and would have forfeited his right to be called the person at the head of this municipal government. *Wilcox v. People*, 90 Ills., 186; *State v. Fire Comm'rs*, 26 Ohio St., 24; *United States v. Corson*, 114 U. S., 619; *McElrath v. United States*, 102 U. S., 426; *Mimmack v. United States*, 97 U. S., 426; *Steubenville v. Culp*, 38 Ohio St., 18.

BY THE COURT:

On the 19th day of April, 1901, Henry Gumble, Eugene M. Kerr, Edward B. Dillon and William Fisher, constituted the civil service commission of the city of Columbus, Ohio, having been previously appointed and qualified as such under an act of the legislature passed April 14, 1900 (94 Laws, 603), entitled an act to regulate and improve the civil service of cities of the grade and class of Columbus; and on that day the entire board was removed from office by the mayor of the city, John N. Hinkle, without notice or opportunity to be heard, by an order entered upon his records specifying as the ground of his order that they were incompetent for the duties of the office; and thereupon he appointed the defendants to constitute such board, who assumed to qualify and enter upon the duties of the board; and claim to hold the office and are interfering with the former members in the discharge of their duties. The prayer is that they may be required to show by what authority they do so, and that they may be ousted therefrom and enjoined from interfering with the members of the board in the discharge of their duties. The gist of the answer is that the board had misconstrued the

statute under which it had been created, and assumed when requested by the proper department to furnish but one candidate from the list of eligibles for appointment. The contention arises upon the proper construction of section 5 of the act, which is as follows:

"Sec. 5. In case of any vacancy in the classified service of said city, notice shall be given the commission by the appointing power of said vacancy, and thereupon the commission shall certify in writing to the appointing power, the names, addresses and grades of the candidates, not exceeding three in number, for any such vacancy, whose names shall stand highest on the appropriate register, and it shall then be the duty of the appointing power to appoint on probation, to fill such vacancy, one of the said candidates whose name shall have been so certified."

By a construction placed upon this section, in a rule adopted to that effect, the removed board claimed that it complied with the statute by furnishing the name of one such person, when requested to furnish names for the purpose of appointment. The construction placed on it by the mayor is that it requires the board to furnish the names of three such persons, or at least two and for the refusal of the board to adopt his construction he made the order of removal, on the ground of incompetency.

The court is of the opinion that the commission erred in the construction it placed on the statute. The fair construction is that they should certify to the proper department when requested at least two names, on the other hand we think the mayor is in error in his claim that it should certify three names. But such error of judgment is not of itself evidence

of such incompetency in the board as would authorize its removal from office. Such errors frequently arise in the performance of their duties by public officers, and it has not hitherto been regarded as an evidence of such incompetency as to require that they should be removed. We do not say that such a flagrant case might not occur as would require the exercise of such authority. Here, however, the construction of a statute is involved about which there is room for an honest difference of opinion; and the proper remedy would have been a proceeding in mandamus, requiring them to certify the number of names claimed by the mayor. This would have offered them an opportunity to be heard and to have obtained a judicial construction of the statute. To remove an incumbent from office for an error of judgment in the construction of a statute that is open to doubt, and without an opportunity to be heard, seems rather too drastic a remedy to be consistent with the liberal principles of our system of government.

Power is conferred on the mayor to remove any commissioner for incompetence, neglect of duty, malfeasance in office, habitual drunkenness, or gross immorality; and any manifest failure on the part of any commissioner to enforce the provisions of the act. The power is one that cannot be arbitrarily exercised. It requires charges to be made, supported by such a statement of facts as in judgment of law constitute the charge made; and an opportunity to the party to be heard. Whilst the court cannot pass on the truth of the facts alleged, or interfere with the discretion of the mayor in this regard, it may and will, when appealed to, pass on the sufficiency of the facts on which the charges are made. *State v. Hawkins*, 44

Ohio St., 98; *State v. Bryson*, 44 Ohio St., 457; *State v. McLain*, 58 Ohio St., 313; *State v. Sullivan*, 58 id., 513.

We cannot accept the claim of the defendants, that the power to remove the board of commissioners, or any of its members, in the mode adopted by the mayor, is conferred on him by what is termed the charter law. Whatever powers of removal are conferred by that act, they do not apply to the removal of the members of the civil service commission. It was created and the mode of removal provided for, by a subsequent act, which provides the grounds upon which a removal may be had. The provisions of this act govern the case, and are in no way varied by the provisions of the charter law. To remove any of its members without properly formulated charges and without an opportunity to be heard, would hardly be consistent with the principle of civil service. Men of the requisite character and ability would hardly accept the position under such circumstances.

Judgment of ouster; and induction of former board.

MEMORANDA
OF
CAUSES DECIDED DURING THE PERIOD EMBRACED IN
THIS VOLUME, WHICH ARE NOT
REPORTED IN FULL.

No. 6725.

DODGE MFG. CO. ET AL. v. DELL ET AL.

(Decided January 15, 1901.)

ERROR to the Circuit Court of Franklin county.

William T. McClure; Daniel Short; Crum, Raymond & Hedges; James C. Nicholson; and Arnold, Morton & McCoy, for plaintiffs in error.

Rankin & Rector; John F. Fergus, and Kinkead, Merwine & Rhodes, for defendants in error.

Judgment affirmed.

WILLIAMS and SPEAR, JJ., dissent.

No. 6734.

BANKING COMPANY v. SMITH ET AL.

(Decided January 15, 1901.)

ERROR to the Circuit Court of Darke county.

Allread & Teegarden and John C. Clark, for plaintiffs in error.

Anderson & Boorman, for defendants in error.

Memoranda of

Judgment affirmed on authority of *Pendery v. Allen*, 53 Ohio St., 251.

SHAUCK, C. J., MINSHALL, WILLIAMS, BURKET, SPEAR and DAVIS, JJ., concur.

No. 6738.

WIKEL, PARTNER, ETC., v. DEERING & CO., ET AL.

(Decided January 15, 1901.)

ERROR to the Circuit Court of Erie county.

Kelly & Merrill, for plaintiff in error.

John F. McCrystal and *Frank W. Babcock*, for defendants in error.

Judgment affirmed.

SHAUCK, C. J., MINSHALL, WILLIAMS, BURKET, SPEAR and DAVIS, JJ., concur.

No. 6756.

THOMPSON ET AL v. VANDERSLICE.

(Decided January 15, 1901.)

ERROR to the Circuit Court of Mahoning county.

E. N. Brown and *Frank Jacobs*, for plaintiffs in error.

C. J. Miller, for defendant in error.

Judgment affirmed.

SHAUCK, C. J., MINSHALL, SPEAR and DAVIS, JJ., concur.

WILLIAMS and BURKET, JJ., dissent.

Causes not reported in full.

No. 6772.

CURRAN *v.* RAILROAD COMPANY.

(Decided January 15, 1901.)

ERROR to the Circuit Court of Mahoning county.

J. R. Johnston; A. J. Woolf and F. H. Guffey, for plaintiff in error.*J. P. Wilson*, for defendant in error.

Judgment affirmed.

SHAUCK, C. J., MINSHALL, SPEAR and DAVIS, JJ.,
concur.

WILLIAMS and BURKET, JJ., dissent.

No. 6980.ETTER *v.* RAILWAY COMPANY.

(Decided January 15, 1901.)

ERROR to the Circuit Court of Richland county.

Skiles & Skiles; Brucker & Cummins and Hutchinson & Palmer, for plaintiff in error.*J. R. Carey and F. J. Mullins*, for defendant in error.

Judgment affirmed.

SHAUCK, C. J., WILLIAMS, BURKET, SPEAR and
DAVIS, JJ., concur.

Memoranda of

No. 7048.

THOMAS v. BEARD, GUARDIAN.

(Decided January 15, 1901.)

ERROR to the Circuit Court of Franklin county.

J. D. Sullivan and John Morrissey, for plaintiff in error.*W. M. Thompson and Bennet & Bennett*, for defendant in error.

Judgment affirmed.

SHAUCK, C. J., MINSHALL, WILLIAMS and DAVIS, JJ., concur.

BURKET and SPHAR, JJ., dissent.

No. 6774.

RAILROAD COMPANY ET AL. v. ELECTRIC RAILWAY COMPANY.

(Decided January 22, 1901.)

ERROR to the Circuit Court of Butler county.

R. D. Marshall and Millikin, Shotts & Millikin, for plaintiffs in error.*W. C. Shepherd and Wilcox, Collister, Hogan & Parmely*, for defendant in error.

Judgment affirmed.

SHAUCK, C. J., MINSHALL, WILLIAMS and BURKET, JJ., concur.

Causes not reported in full.

No. 6866.

AGRICULTURAL SOCIETY ET AL. *v.* REBER ET AL., EXRS.

(Decided January 22, 1901.)

ERROR to the Circuit Court of Marion county.

J. F. McNeal & Sons and *D. R. Crissinger*, for plaintiffs in error.

W. Z. Davis and *H. N. Quigley*, for defendants in error.

Judgment affirmed.

MINSHALL, WILLIAMS and BURKET, JJ., concur.

DAVIS, J., having been of counsel, did not sit in the case.

No. 7028.

CLEMONS *v.* SOLAR REFINING COMPANY.

(Decided January 22, 1901.)

ERROR to the Circuit Court of Allen county.

D. C. Henderson, for plaintiff in error.

Wheeler & Brice, for defendant in error.

Judgment affirmed.

SHAUCK, C. J., MINSHALL, BURKET and DAVIS, JJ., concur.

SPEAR and WILLIAMS, JJ., dissent, believing that there is error in the charge.

No. 7099.

STATE OF OHIO *v.* WINGET.

(Decided January 22, 1901.)

ERROR to the Circuit Court of Erie county.

Memoranda of

John Ray, for plaintiff in error.

Frank P. Colver, for defendant in error.

Judgment affirmed.

SHAUCK, C. J., MINSHALL, BURKET, SPEAR and
DAVIS, JJ., concur.

WILLIAMS, J., absent.

No. 6154.

DAGES ET AL. v. FISHER ET AL.

(Decided January 29, 1901.)

ERROR to the Circuit Court of Defiance county.

Powell & Minahan, for plaintiffs in error.

Harris & Harris, for defendants in error.

Judgment affirmed.

SHAUCK, C. J., MINSHALL, WILLIAMS, BURKET,
SPEAR and DAVIS, JJ., concur.

No. 6163.

CLARK v. CLARK ET AL.

(Decided January 29, 1901.)

ERROR to the Circuit Court of Licking county.

J. R. Davies and *S. M. Hunter*, for plaintiff in
error.

Waldo Taylor, for defendants in error.

Judgment affirmed.

MINSHALL, WILLIAMS, and DAVIS, JJ., concur.

Causes not reported in full.

No. 6775.

RICE ET AL. v. RICHARDS.

(Decided January 29, 1901.)

ERROR to the Circuit Court of Jackson county.

Powell & Eubanks, for plaintiffs in error.

J. M. McGillivray, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR and DAVIS, JJ., concur

No. 6809.

ROBINSON ET AL. v. ROBINSON.

(Decided January 29, 1901.)

ERROR to the Circuit Court of Jefferson county.

Justin A. Moore, for plaintiffs in error.

Walter C. Taylor, for defendant in error.

Judgment affirmed.

SHAUCK, C. J., WILLIAMS, BURKET, SPEAR and
DAVIS, JJ., concur.

No. 6820.

BRADFIELD ET AL. v. FLOOD, ADMR.

(Decided January 29, 1901.)

ERROR to the Circuit Court of Belmont county.

Petty & Crew, for plaintiffs in error.

F. B. Doudna, for defendant in error.

Memoranda of

Judgment affirmed.

SHAUCK, C. J., WILLIAMS, SPEAR and DAVIS, JJ.,
concur.

MINSHALL and BURKET, JJ., dissent.

No. 7190.

DIEBOLD SAFE & LOCK CO. v. BOWE.

(Decided January 29, 1901.)

ERROR to the Circuit Court of Stark county.

Wilcox & Friend and *Clark, Ambler & Clark*, for
plaintiff in error.

Monnott & Whitacre and *Hugh & McCarty*, for de-
fendant in error.

Judgment affirmed.

MINSHALL, WILLIAMS and BURKET, JJ., concur.

No. 6595.

ALSOP ET AL., EXRS., v. CATTELL ET AL., EXRS.

(Decided February 5, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

Tuttle & Fillius and *Young & Trent*, for plaintiffs
in error.

T. W. Shreve, for defendants in error.

Judgment reversed in part and cause remanded
with instructions as shown by journal entry.

SHAUCK, C. J., WILLIAMS, BURKET, SPEAR and
DAVIS, JJ., concur.

SPEAR, J., being also of opinion that the judgment
should be reversed in toto.

Causes not reported in full.

No. 6202.

BANK ET AL. v. FELTON, RECEIVER, ET AL.

(Decided February 19, 1901.)

ERROR to the Circuit Court of Erie county.

Hewson L. Peeke, for plaintiffs in error.*Lawrence Maxwell, Jr.; Wickham, Guerin & French*
and *George R. Reiter*, for defendants in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, SHAUCK and DAVIS, JJ.,
concur.

No. 6744.

VILLAGE OF UHRICHSVILLE v. FISHER, AN INFANT.

(Decided February 19, 1901.)

ERROR to the Circuit Court of Tuscarawas county.

Healea & Greene, for plaintiff in error.*T. H. Loller and Bailey & Douthitt*, for defendant
in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS
and SHAUCK, JJ., concur.

No. 6783.FLEMING ET AL., INFANTS, v. HOUSEMAN, ADMR.,
ET AL.

(Decided February 19, 1901.)

ERROR to the Circuit Court of Franklin county.

Memoranda of

Samuel Hambleton, for plaintiffs in error.

Dyer, Williams & Stouffer, for defendants in error.

Judgment affirmed on authority of *Hershizer v. Florence*, 39 Ohio St., 516.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS
and SHAUCK, JJ., concur.

No. 6831.

KIRKBRIDE v. CLINE.

(Decided February 19, 1901.)

ERROR to the Circuit Court of Hancock county.

William F. Duncan, for plaintiff in error.

John Sheridan, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 7276.

KIRKBRIDE v. LOACH.

(Decided February 19, 1901.)

ERROR to the Circuit Court of Hancock county.

William F. Duncan, for plaintiff in error.

Bitler & Dwiggins, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

Causes not reported in full.

No. 6183.

HESS v. ELECTRIC RAILWAY COMPANY.

(Decided February 26, 1901.)

ERROR to the Circuit Court of Stark county.

R. A. Pinn and Harter & Krichbaum, for plaintiff
in error.

R. H. Day, and Day, Lynch & Day, for defendant
in error.

Judgment affirmed.

MINSHALL, C. J., BURKET and SHAUCK, JJ., concur.

No. 6827.

MCCLEERY v. KINSEL ET AL.

(Decided February 26, 1901.)

ERROR to the Circuit Court of Fairfield county.

C. W. McCleery, for plaintiff in error.

William Davidson, for defendant in error.

Judgment reversed and judgment as per entry.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 7031.

RAILROAD COMPANY v. LERSCH.

(Decided February 26, 1901.)

ERROR to the Circuit Court of Richland county.

Memoranda of

J. H. Collins and Cummings & McBride, for plaintiff in error.

Jabez Dickey and Jenner & Weldon, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 7072.

RAILROAD COMPANY *v.* WIKOFF, ADMR.

(Decided February 26, 1901.)

ERROR to the Circuit Court of Scioto county.

Hollister & Hollister; W. A. De Camp and Oscar W. Newman, for plaintiff in error.

Evans & Livingston and Holcomb & Finney, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., BURKET and SPEAR, JJ., concur.

No. 7136.

RAILWAY COMPANY *v.* DUNLAP.

(Decided February 26, 1901.)

ERROR to the Circuit Court of Huron county.

Causes not reported in full.

John T. Dye and *C. P. & L. W. Wickham*, for plaintiff in error.

E. M. Palmer and *Andrews Bros.*, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR and SHAUCK, JJ.,
concur.

No. 6750.

McLAREN v. COWING, ADMR., ETC.

(Decided March 5, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

Johnson & Hackney, for plaintiff in error.

Mason & Taft, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6803.

MERCANTILE CREDIT GUARANTEE CO. v. LITTLEFORD &
BRO.

(Decided March 5, 1901.)

ERROR to the Circuit Court of Hamilton county.

Memoranda of

Follett & Kelley, for plaintiff in error.

Littleford, Morris, Ballard & Sawyer, for defendant
in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6805.

SHIELDS ET AL. v. BETTS ET AL.

(Decided March 5, 1901.)

ERROR to the Circuit Court of Hamilton county.

Wm. Hartley Pugh, for plaintiffs in error.

John A. Corbin, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6840.

PEPPLE, ADMR., v. PEPPLE ET AL.

(Decided March 5, 1901.)

ERROR to the Circuit Court of Hancock county.

Jason Blackford and *J. A. Bope*, for plaintiff in
error.

Shafer & Shafer and *Pendleton & Whiteley*, for de-
fendants in error.

Judgment affirmed.

MINSHALL, C. J., SPEAR and SHAUCK, JJ., concur.

Causes not reported in full.

No. 6842.

WITMORE v. OHIO OIL COMPANY.

(Decided March 5, 1901.)

ERROR to the Circuit Court of Hancock county.

Jason Blackford, for plaintiff in error.*John Poe*, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., BURKET, DAVIS and SHAUCK, JJ.,
concur.

No. 6868.

BOARD OF EDUCATION ET AL. v. STATE EX REL. UNGER
ET AL.

(Decided March 5, 1901.)

ERROR to the Circuit Court of Montgomery county.

Craighead & Craighead; L. S. Crickmore; W. A. Neal and J. W. King, for plaintiffs in error.*J. A. & C. R. Gilmore and R. E. Lowery*, for defendants in error.

Judgment reversed.

WILLIAMS, BURKET, DAVIS and SHAUCK, JJ.,
concur.

No. 7075.

BUTLER, ADMR., v. RAILROAD COMPANY.

(Decided March 5, 1901.)

ERROR to the Circuit Court of Allen county.

Memoranda of

Ridenour & Halfhill: Charles B. Adgate and D. C. Henderson, for plaintiff in error.

John B. Cockrum; W. B. Richie and W. H. Leete, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., BURKET, DAVIS and SHAUCK, JJ., concur.

No. 7181.

SNYDER v. STATE.

(Decided March 5, 1901.)

ERROR to the Circuit Court of Portage county.

S. F. Henselman and S. P. Wolcott, for plaintiff in error.

W. J. Beckley, Prosecuting Attorney, for defendant in error.

Judgment affirmed.

**MINSHALL, C. J., DAVIS and SHAUCK, JJ., concur.
BURKET, J., dissents.**

No. 7189.

NICHOLSON ET AL. v. CARLISLE.

(Decided March 5, 1901.)

ERROR to the Circuit Court of Guernsey county.

Causes not reported in full.

J. A. Troette; J. H. Mackey and W. C. Collins, for plaintiffs in error.

Rosemond & Pace, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS and SPEAR, JJ., concur.

BURKET and DAVIS, JJ., dissent.

No. 7200.

FIELD v. BEAVIS, EXECUTOR.

(Decided March 5, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

C. M. Vorce, for plaintiff in error.

Beavis & Johnson and George S. Kain, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6221.

NATIONAL BANK v. PIPPIT ET AL.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Ashland county.

John W. Mykrantz and Clark, Ambler & Clark, for plaintiff in error.

Campbell & Semple, for defendants in error.

Judgment affirmed.

WILLIAMS, DAVIS and SHAUCK, JJ., concur.

BURKET and SPEAR, JJ., dissent.

Memoranda of

No. 6501.

BOGARD *v.* RAILWAY COMPANY.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Putnam county.

Thomas W. Prentiss and Leasure & Powell, for plaintiff in error.*W. B. Richie; W. H. Lecte and Daniel M. Bailey*, for defendant in error.

Judgment reversed and cause remanded to the probate court on the authority of *State v. Sherman*, 22 Ohio St., 433, and *Railroad Co. v. O'Harra*, 48 Ohio St., 343.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6762.BRADY *v.* SILVERS.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Lucas county.

C. F. Watts, for plaintiff in error.*Ira Taber and Clifford C. Whitmore*, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

Causes not reported in full.

No. 6763.

BRADY v. PALMER.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Lucas county.

C. F. Watts, for plaintiff in error.

Ira Taber and Clifford C. Whitmore, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK,
JJ., concur.

No. 6789.

WADE v. BROWN.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Butler county.

Millikin, Shotts & Millikin, for plaintiff in error.

Edward H. Jones and Morey, Andrews & Morey,
for defendant in error.

Judgment of the Circuit Court vacated, and cause
remanded to that court on authority of *Deglow, Exr.*,
v. *Kruse*, 57 Ohio St., 434.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6795.

CHENEY v. NATIONAL BANK ET AL.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Lucas county.

Memoranda of

Seney & Johnson, for plaintiff in error.

Smith & Beckwith and *R. S. Holbrook*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6800.

POTTER v. KARRICK ET AL.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Hancock county.

Jason Blackford & Byal, for plaintiff in error.

Totten & Cole; Ross & Kinder; William F. Duncan
and *McConica & Banker*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6806.

REPUBLICAN COMPANY v. SHOUPE.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Hancock county.

H. F. Burket, for plaintiff in error.

W. W. Shuler, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and
SHAUCK, JJ., concur.

BURKET, J., not sitting.

Causes not reported in full.

No. 6807.

MCNEAL, EXECUTOR, *v.* COSS ET AL.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Ross county.

D. M. Massie and Vanmeter & Cunningham, for plaintiff in error.

F. P. Hinton, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 7123.

RAILWAY COMPANY *v.* SHAW.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Mahoning county.

Thomas W. Sanderson, for plaintiff in error.

Jones & Anderson; D. F. Anderson and A. J. Woolf, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS and BURKET, JJ.,
concur.

No. 7301.

GANNON, ADMRX., *v.* STREET RAILWAY COMPANY.

(Decided March 12, 1901.)

ERROR to the Circuit Court of Hamilton county.

Memoranda of

W. A. Hicks and Winkler & Rogers, for plaintiff
in error.

Paxton & Warrington, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK,
JJ., concur.

No. 6223.

INSURANCE COMPANY *v.* SALRIN, JR.

(Decided March 19, 1901.)

ERROR to the Circuit Court of Coshocton county.

Lee Ellicott and Pomcrene & Pomerene, for plain-
tiff in error.

James Glenn and T. C. Roche, for defendant in
error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, DAVIS and
SHAUCK, JJ., concur.

No. 6230.

SULLIVAN, RECEIVER, *v.* BRYAN ET AL.

(Decided March 19, 1901.)

ERROR to the Circuit Court of Summit county.

Causes not reported in full.

Collins & Fletcher and *Grant & Sieber*, for plaintiff in error.

Doyle & Bryan; Otis & Otis and *A. E. Kling*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

6799.

MERCHANTS' NATIONAL BANK *v.* McMULLEN, AS-
SIGNEE.

(Decided March 19, 1901.)

ERROR to the Circuit Court of Lucas county.

Swayne, Hayes & Tyler, for plaintiff in error.

H. S. Bunker and *Ralph Emery*, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6810.

CRAWFORD ET AL. *v.* HARTUPEE, ADMRX.

(Decided March 19, 1901.)

ERROR to the Circuit Court of Hamilton county.

Memoranda of

H. S. Brewster, for plaintiffs in error.

Charles W. Baker, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and
SHAUCK, JJ., concur.

BURKET, J., absent.

No. 7124.

AUSTIN *v.* STATE.

(Decided March 19, 1901.)

ERROR to the Circuit Court of Logan county.

John H. Willis and *John A. Price*, for plaintiff in
error.

S. H. West, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 7165.

RAILWAY COMPANY *v.* PIERSON.

(Decided March 19, 1901.)

ERROR to the Circuit Court of Mahoning county.

Thomas W. Sanderson, for plaintiff in error.

Jones & Anderson and *D. F. Anderson*, for defend-
ant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

Causes not reported in full.

No. 6247.

SHAFFER *v.* BLAKESLEY ET AL., ADMES.

(Decided March 26, 1901.)

ERROR to the Circuit Court of Hancock county.

George F. Pendleton and *M. C. Shafer*, for plaintiff in error.*George H. Phelps*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR and DAVIS, JJ., concur.

No. 6281.RUGGLES *v.* CITY OF NORWALK.

(Decided March 26, 1901.)

ERROR to the Circuit Court of Huron county.

George R. Walker and *S. M. Young*, for plaintiff in error.*B. B. Wood* and *Andrews Bros.*, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6796.SWISHER *v.* MCWHINNEY ET AL.

(Decided March 26, 1901.)

ERROR to the Circuit Court of Darke county.

Memoranda of

Meeker & Gaskill and Allread & Teegarden, for plaintiff in error.

R. S. Frizell and Anderson & Bowman, for defendants in error.

Judgment reversed and judgment for plaintiff in error.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6812.

HIPPEL ET AL., EXECUTORS, v. ROWE.

(Decided March 26, 1901.)

ERROR to the Circuit Court of Jackson county.

John T. Moore and J. M. McGillivray, for plaintiffs in error.

E. C. Powell and F. E. Eubanks, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, and BURKET, JJ., concur.

No. 6835.

NATIONAL BANK v. DEAL ET AL.

(Decided March 26, 1901.)

ERROR to the Circuit Court of Crawford county.

Causes not reported in full.

D. W. Locke, for plaintiff in error.

McNeal & Sons; Harris, Sears & Monnette and L. C. Feighner, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET and SPEAR, JJ., concur.

No. 6858.

SOUTHERN GAS & OIL COMPANY *v.* CENTRAL OHIO
NATURAL GAS & FUEL COMPANY ET AL.

(Decided March 26, 1901.)

ERROR to the Circuit Court of Fairfield county.

Durban & McDermott and George E. Martin, for plaintiff in error.

Nash, Lentz, Addison & Fritter, and *A. I. Vorys*, for defendants in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6232.

CODY ET AL. *v.* OLMSTEAD ET AL.

(Decided March 29, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

Memoranda of

White, Johnson, McCaslin & Cannon, for plaintiffs in error.

Boynton & Horr, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS and BURKET, JJ., concur.

No. 6257.

BROXTERMAN, RECEIVER, v. STALL ET AL.

(Decided March 29, 1901.)

ERROR to the Superior Court of Cincinnati.

Goebel & Bettinger, for plaintiff in error.

Alfred B. Benedict, for defendants in error.

Judgment of the circuit court reversed and that of the common pleas affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6258.

HAZELTINE v. HEWITT, TRUSTEE, ET AL.

(Decided March 29, 1901.)

ERROR to the Circuit Court of Hamilton county.

Thomas McDougal and *Alfred C. Cassatt*, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and SHAUCK, JJ., concur.

Causes not reported in full.

No. 6275.

BLACK v. SMITH, ADMR.

(Decided March 29, 1901.)

ERROR to the Circuit Court of Clark county.

Ellis H. Kerr, for plaintiff in error.

Weaver, Stafford & Arthur and *B. H. Rannells*,
for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6276.

BLACK v. NEFF.

(Decided March 29, 1901.)

ERROR to the Circuit Court of Clark county.

Ellis H. Kerr, for plaintiff in error.

Weaver, Stafford & Arthur and *B. N. Rannells*, for
defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6736.

COLLOPY v. STATE.

(Decided March 29, 1901.)

ERROR to the Circuit Court of Fayette county.

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Memoranda of

D. I. Worthington, for plaintiff in error.

C. A. Reid, Prosecuting Attorney, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6824.

KAYLOR v. SEAMAN ET AL.

(Decided March 29, 1901.)

ERROR to the Circuit Court of Darke county.

O. R. Krickenberg, for plaintiff in error.

H. F. Dershem and *A. C. Robeson*, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., DAVIS and SHAUCK, JJ., concur.
BURKET, J., dissents.

No. 6857.

TRUSTEES OF THE GENERAL ASSEMBLY OF THE PRES-
BYTERIAN CHURCH v. MEEHAN ET AL.

(Decided April 9, 1901.)

ERROR to the Circuit Court of Franklin county.

Causes not reported in full.

Eugene Lane, for plaintiff in error.

G. J. Marriott and Kinkad & Merwine, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., BURKET, SPEAR and SHAUCK, JJ., concur.

DAVIS, J., absent.

No. 7292.

BEACHMAN ET AL. v. STATE EX REL. DEITZ.

(Decided April 9, 1901.)

ERROR to the Circuit Court of Clermont county.

E. Q. Crane and H. L. Nichols, for plaintiffs in error.

Louis Hicks, for defendant in error.

Judgment reversed on the authority of *Randall et al. v. State ex rel. Hunter et al.*, ante 57, and petition dismissed.

No. 6856.

TAYLOR, ASSIGNEE, v. OWENS, TRUSTEE, ET AL.

(Decided April 16, 1901.)

ERROR to the Circuit Court of Licking county.

Waldo Taylor, for plaintiff in error.

Kibler & Kibler, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 7162.

HUNT, RECEIVER, v. CARL.

(Decided April 16, 1901.)

ERROR to the Circuit Court of Lucas county.

Brown & Geddes and Charles A. Schmettau, for plaintiff in error.

Hurd, Brumback & Thatcher and Orville S. Brumback, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET and DAVIS, JJ., concur.

No. 7313.

RAILROAD COMPANY v. HAFLEY, JR., ETC.

(Decided April 16, 1901.)

ERROR to the Circuit Court of Lake county.

Ford, Snyder, Henry & McGraw, and A. G. Reynolds, for plaintiff in error.

Bosworth & Hammar and Jones & Anderson, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 7344.

JOHNS v. MURDOCK ET AL.

(Decided April 16, 1901.)

ERROR to the Circuit Court of Lawrence county.

Causes not reported in full.

A. R. Johnson and E. E. Corn, for plaintiff in error.

J. L. Anderson, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR and DAVIS, JJ., concur.

No. 6295.

TUAL *v.* STOLLBERG & CLAPP COMPANY ET AL.

(Decided April 23, 1901.)

ERROR to the Circuit Court of Lucas county.

Ashton H. Coldham, for plaintiff in error.

Lyman W. Wachenhimer; T. L. Gifford and Hamilton & Kirby, for defendants in error.

Judgment affirmed on the authority of *Ryan, Sheriff, v. Root & McBride Bros.*, 56 Ohio St., 302, and *Doll v. Barr*, 58 Ohio St., 113.

MINSHALL, C. J., WILLIAMS, BURKET and SPEAR, JJ., concur.

No. 6297.

CASS *v.* DUNHAM ET AL.

(Decided April 23, 1901.)

ERROR to the Circuit Court of Morrow county.

Memoranda of

J. W. Coulter and O. W. Aldrich, for plaintiff in error.

Harlan & Wood and Mitchell & Bruce, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET and SHAUCK, JJ., concur.

No. 6891.

DORMAN GROCERY v. YOUNG ET AL.

(Decided April 23, 1901.)

ERROR to the Circuit Court of Darke county.

Allread & Teegarden, for plaintiff in error.

Anderson & Bowman and M. F. Myers, for defendants in error.

Judgment affirmed on authority of *Keever v. Hunter*, 62 Ohio St., 616.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR and SHAUCK, JJ., concur.

DAVIS, J., absent.

No. 6894.

VANAS v. VANAS.

(Decided April 23, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

Causes not reported in full.

J. M. Nowak and Joseph Moore, for plaintiff in error.

Reynolds & Carpenter, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR and SHAUCK, JJ., concur.

No. 6897.

DAYTON ET AL. v. CITY RAILWAY COMPANY.

(Decided April 23, 1901.)

ERROR to the Circuit Court of Montgomery county.

Edwin P. Matthews, City Solicitor, for plaintiffs in error.

McMahon & McMahon, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR and SHAUCK, JJ., concur.

No. 6915.

CASE ET AL. v. SHAFER ET AL.

(Decided April 23, 1901.)

ERROR to the Circuit Court of Wyandot county.

A. E. Walton, for plaintiffs in error.

Carey & Parker, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

Memoranda of

No. 7098.

REIGEL *v.* COONS.

(Decided April 23, 1901.)

ERROR to the Circuit Court of Hancock county.

John Poe and George F. Pendleton, for plaintiff in error.

Ross & Kinder and J. Frank Arline, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., BURKET and SHAUCK, JJ., concur.

No. 7149.

RAILWAY COMPANY *v.* ULLOM, ADMRX.

(Decided April 23, 1901.)

ERROR to the Circuit Court of Morrow county.

Cummings & McBride; Olds & Olds and J. T. Dye, for plaintiff in error.

Mitchell & Brice and J. W. Barry, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6268.

STIMSON *v.* HEGLER ET AL.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Fayette county.

Causes not reported in full.

*W. C. Tanzey and John Loyan, for plaintiff in
Van Deman & Chaffin, for defendants in error.*

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6302.

CALDWELL ET AL. v. HEINTZ.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Hamilton county.

Johnson & Levy, for plaintiffs in error.

Mortimer Matthews, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS and SPEAR, JJ., concur.

No. 6304.

GLENN ET AL. v. ANDRESS ET AL.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Hamilton county.

*W. C. Herron; Herron, Gatch & Herron and August
W. Bruck, for plaintiffs in error.*

*Follett & Kelley; Drausin Wulsin and Frank O.
Suire, for defendants in error.*

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6321.

BARNEY *v.* BROWN.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Erie county.

Charles L. Hubbard, for plaintiff in error.

Kelly & Merrill, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, and
DAVIS, JJ., concur.

No. 6885.

STATE EX REL. ATTORNEY GENERAL *v.* RAPID TRANSIT
COMPANY.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Greene county.

J. M. Sheets, Attorney General, and *Charles Dar-
lington*, for plaintiff in error.

M. Shoup and *H. L. Smith*, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and SHAUCK, JJ., concur.

No. 6892.

FRANCIS *v.* ASHBAUGH, TRUSTEE, ET AL.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Mahoning county.

Causes not reported in full.

Norris, Jackson & Rose, for plaintiff in error.

W. S. Anderson; M. C. McNab, and J. P. Wilson,
for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, DAVIS and
SHAUCK, JJ., concur.

No. 6893.

PITTSBURG REFINING COMPANY v. JENNINGS ET AL.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Monroe county.

Mallory & Sears, for plaintiff in error.

*J. P. Spriggs & Son; G. G. Jennings and W. V.
Walton*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6916.

WASNER v. RAWLINS.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Lawrence county.

A. T. Holcomb and John Hamilton, for plaintiff in
error.

A. R. Johnson and E. E. Corn, for defendant in
error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

Memoranda of

No. 6918.

ADDY ET AL. v. JEWELL.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Mercer county.

C. S. Mauk, for plaintiffs in error.*LeBlond & Landfair*, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 6924.

LEONARD v. STRUBLE ET AL.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Morrow county.

Olds & Olds, for plaintiff in error.*L. K. Powell*, for defendants in error.

Judgment vacated and cause remanded to the circuit court with directions to consider bill of exceptions.

No. 6928.

EATON v. SMITH.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Geauga county.

Causes not reported in full.

N. H. Bostwick, for plaintiff in error.

Metcalfe & King and *G. W. Alvord*, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6939.

MOORMANN *v.* FOX, EXECUTOR.

(Decided April 30, 1901.)

ERROR to the Superior Court of Cincinnati.

Frank J. Moormann and *Stephens & Lincoln*, for plaintiff in error.

W. F. Fox, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6944.

HAMMERLY *v.* ZETTLER.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Stark county.

Lynch, Day & Day, for plaintiff in error.

Clark, Ambler & Clark, for defendant in error.

Judgment affirmed, except as to Dow Tax as per entry.

WILLIAMS, BURKET and DAVIS, JJ., concur.

SPEAR and SHAUCK, JJ., concur in the judgment of reversal as to Dow Tax.

Memoranda of

No. 7434.

STATE EX REL. VAIL *v.* CRAIG, AUDITOR, ETC., ET AL.

(Decided April 30, 1901.)

ERROR to the Circuit Court of Cuyahoga county

Samuel Doerfler, for plaintiff in error.*P. H. Kaiser and Frederick L. Taft*, for defendants
in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ.,
concur.

MINSHALL, C. J., absent.

No. 6330.PRESTON *v.* WOLF.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Richland county.

Bradford & Moorhouse and Donnell & Marriott, for
plaintiff in error.*Kerr & La Dow and Douglass & Mengert*, for defend-
ant in error.Judgment of the circuit court vacated, and cause
remanded with instructions to consider the bill of ex-
ceptions.WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ.,
concur.

MINSHALL, C. J., absent.

Causes not reported in full.

No. 6333.

WYMOND COOPERAGE COMPANY v. THOMPSON.

(Decided May 7, 1901.)

ERROR to the Superior Court of Cincinnati.

C. B. Matthews and Pogue & Pogue, for plaintiff in error.*Parson, Warrington & Boutet*, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ.,
concur.

MINSHALL, C. J., absent.

No. 6345.

CONNOR v. CURRAN ET AL.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Fayette county.

Harper & Harper, for plaintiff in error.*Post & Reid and Mills Gardner*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., BURKET, DAVIS and SHAUCK, JJ.,
concur.

WILLIAMS, J., not sitting.

Memoranda of

No. 6922.

MORGAN v. KATZENSTEIN.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Stark county.

George E. Baldwin; D. Fording and D. E. Rogers,
for plaintiff in error.

Welty & Albaugh; Lynch, Day & Day and A. C.
Strong, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS
and SHAUCK, JJ., concur.

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No. 6932.

LECKLIDER, RECEIVER, v. HALDERMAN ET AL.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Darke county.

Elliott & Chenoweth and John C. Clark, for plaintiff
in error.

Anderson & Bowman; Allread & Teegarden; O. R.
Krackenberger and A. F. Broomhall, for defendants in
error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS
and SHAUCK, JJ., concur.

Causes not reported in full.

No. 6937.

WHITNEY *v.* ROTH ET AL.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Preble county.

J. A. & C. R. Gilmore and Stafford & Arthur, for plaintiff in error.*J. W. King; O. Sheppard and E. B. Stephenson*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., BURKET, SPEAR and DAVIS, J.J. concur.

No. 6940.

CITY OF SALEM *v.* FAWCETT.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Columbiana county.

Lewis P. Metzger and A. W. Taylor, for plaintiff in error.*Carey, Boyle & Mullins*, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, J.J., concur.

MINSHALL, C. J., absent.

No. 6945.

DUEBER WATCH CASE MFG CO. *v.* PIERO, TRUSTEE.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Stark county.

Memoranda of

Lynch & Day and John C. Given, for plaintiff in error.

A. A. Thayer, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ.,
concur.

MINSHALL, C. J., absent.

No. 6954.

TRUSTEES OF CLARIDON TOWNSHIP *v.* KING, RECEIVER.

(Decided May 7, 1901.)

ERROR to the Circuit Court of Geauga county.

H. O. Bostwick and Metcalfe & King, for plaintiff in error.

Jones & Anderson, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ.,
concur.

MINSHALL, C. J., absent.

No. 6356.

COMMISSIONERS *v.* BLYTH.

(Decided May 14, 1901.)

ERROR to the Circuit Court of Crawford county.

Causes not reported in full.

Harris, Sears & Monnett and *P. W. Poole*, for plaintiff in error.

Dan Babst and *Finley & Gallinger*, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and SHAUCK, JJ., concur.

BURKET, J., absent.

No. 6361.

LEES v. INSURANCE.

(Decided May 14, 1901.)

ERROR to the Circuit Court of Licking county.

Flory & Flory and *C. D. Barrows*, for plaintiff in error.

Jenner & Weldon and *Charles Follett*, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., DAVIS and SHAUCK, JJ., concur.

No. 6370.

NATIONAL BANK COMPANY v. MCILYAR.

(Decided May 14, 1901.)

ERROR to the Circuit Court of Guernsey county.

Memoranda of

Rosemond & Pace, for plaintiff in error.

Mathews, Heade & Mathews, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR and DAVIS, JJ.,
concur.

No. 6901.

HAVILAND *v.* MARKEY ET AL., ADMRS.

(Decided May 14, 1901.)

ERROR to the Circuit Court of Wyandot county.

T. D. Lanker and Benjamin Meck, for plaintiff in
error.

Fred. E. Guthery, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., SPEAR, DAVIS and SHAUCK, JJ.,
concur.

BURKET, J., absent.

No. 6948.

BUTLER ET AL., ADMRS., *v.* THOMAS ET AL.

(Decided May 14, 1901.)

ERROR to the Circuit Court of Franklin county.

Rankin & Rector and Taylor, Taylor & Taylor, for
plaintiffs in error.

Kinkead & Merwine and E. O. Randall, for defend-
ants in error.

Judgment affirmed.

MINSHALL, C. J., SPEAR, DAVIS and SHAUCK, JJ.,
concur.

WILLIAMS and BURKET, JJ., absent.

Causes not reported in full.

No. 6956.

LILLEY *v.* NATIONAL BANK ET AL.

(Decided May 14, 1901.)

ERROR to the Circuit Court of Franklin county.

R. W. McCoy, for plaintiff in error.*F. F. D. Albery*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., DAVIS and SHAUCK, JJ., concur.

No. 6969.THOMAS ET AL. *v.* ENNIS.

(Decided May 14, 1901.)

ERROR to the Circuit Court of Franklin county.

Carpenter & Voorhees, for plaintiffs in error.*Snider & Murphy*, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and
SHAUCK, JJ., concur.

BURKET, J., absent.

No. 6989.STATE EX REL. TIMEUS *v.* PIPER ET AL., TRUSTEES,
ET AL.

(Decided May 14, 1901.)

ERROR to the Circuit Court of Shelby county.

Memoranda of

John F. Wilson, for plaintiff in error.

J. E. Russell and *Andrew J. Hess*, for defendants in error.

Judgment affirmed on the ground that the relator has an adequate remedy in the ordinary course of the law as defined in *Kerr v. Bellefontaine*, 59 Ohio St., 446. Burns Law does not apply.

WILLIAMS, DAVIS and SHAUCK, JJ., concur.

MINSHALL, C. J., dissents.

No. 7198.

INSURANCE COMPANY *v.* LOCK ET AL.

(Decided May 14, 1901.)

ERROR to the Circuit Court of Licking county.

J. V. Hilliard and *Maxwell & Ramsey*, for plaintiff in error.

S. L. James; *Kibler & Kibler* and *Flory & Flory*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 7324.

COMMISSIONERS *v.* CHURCH, ADMR.

(Decided May 14, 1901.)

ERROR to the Circuit Court of Champaign county.

Causes not reported in full.

T. J. Frank; E. P. Middleton and S. S. Deaton, for plaintiff in error.

Charles H. Bosler and George M. Eichelberger, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., SPEAR, DAVIS and SHAUCK, JJ., concur.

BURKET, J., absent.

No. 6235.

SIGLER, ASSIGNEE, *v.* ROGERS, SMITH & Co.

(Decided May 21, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

Everett, Weed & Meals, for plaintiff in error.

White, Johnson, McCaslin & Cannon, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, DAVIS and SHAUCK, JJ., concur.

BURKET, J., dissents.

No. 6373.

INSURANCE COMPANY *v.* PACKET COMPANY.

(Decided May 21, 1901.)

ERROR to the Superior Court of Cincinnati.

Memoranda of

Thomas A. Logan, for plaintiff in error.

Stephens & Lincoln, and *Charles H. Stephens*, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR and SHAUCK, JJ., concur.

BURKET, J., absent.

No. 6374.

POYSER & SON ET AL. v. STANDARD PAVING BRICK COMPANY ET AL.

(Decided May 21, 1901.)

ERROR to the Circuit Court of Stark county.

A. A. Thayer; *C. C. Bow* and *W. J. Piero*, for plaintiffs in error.

Harter & Krichbaum, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, DAVIS and SHAUCK, JJ., concur.

BURKET, J., absent.

No. 6375.

RAILWAY COMPANY v. DUCKWALL.

(Decided May 21, 1901.)

ERROR to the Circuit Court of Clermont county.

Causes not reported in full.

Hollister & Hollister; Walter A. DeCamp and W. W. Dennison, for plaintiff in error.

Nichols & Nichols and Frazier & Hicks, for defendant in error.

Judgment modified and affirmed as to modification.

No. 6964.

MERCER v. RAILROAD COMPANY.

(Decided May 21, 1901.)

ERROR to the Circuit Court of Adams county.

F. D. Bayless; J. R. B. Kesler and Blair & Mahaffey, for plaintiff in error.

Hollister & Hollister; Walter A. DeCamp and T. C. Downey, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKE, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6968.

DAVIES, ASSIGNEE, v. TONG ET AL., TRUSTEES.

(Decided May 21, 1901.)

ERROR to the Circuit Court of Licking county.

Memoranda of

S. M. Hunter and J. R. Davies, for plaintiff in error.

Flory & Flory and Kibler & Kibler, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and SHAUCK, JJ., concur.

BURKET, J., absent.

No. 6979.

LINDE v. WARE.

(Decided May 21, 1901.)

ERROR to the Circuit Court of Hancock county.

John E. Betts and Jason Blackford, for plaintiff in error.

McConica & Banker, for defendant in error.

Judgment reversed and remanded for new trial. Grounds stated in journal entry.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and SHAUCK, JJ., concur.

BURKET, J., absent.

No. 6996.

MORGAN ET AL. v. WAKELIN.

(Decided May 21, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

Causes not reported in full.

E. Sowers, for plaintiffs in error.

Blandin, Rice & Hinn, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and
SHAUCK, JJ., concur.

BURKET, J., absent.

No. 7330.

RAILWAY COMPANY *v.* MUNGER.

(Decided May 21, 1901.)

ERROR to the Circuit Court of Mahoning county.

Thomas W. Sanderson, for plaintiff in error.

George F. Arrel; W. S. Anderson and D. F. Anderson, for defendant in error.

Judgment affirmed on authority of *Railroad Co. v. Hargrat*, 51 Ohio St., 130.

MINSHALL, C. J., WILLIAMS, SPEAR and SHAUCK,
JJ., concur.

BURKET, J., absent.

No. 7404.

STATE EX REL. HOSTETLER *v.* DEITZ ET AL.

(Decided May 21, 1901.)

ERROR to the Circuit Court of Tuscarawas county.

Memoranda of

P. S. Olmstead and John A. Hostetler, for plaintiff in error.

J. F. Grecne and J. H. Mitchell, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., DAVIS and SHAUCK, JJ., concur.

BURKET, J., absent.

No. 7529.

CALDWELL *v.* RAILROAD COMPANY.

(Decided May 21, 1901.)

ERROR to the Circuit Court of Lucas county.

Hurd, Brumback & Thatcher, for plaintiff in error.

Brown & Geddes and Charles A. Schmettau, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6394.

ALLENDER ET AL. *v.* ROSS ET AL.

(Decided June 4, 1901.)

ERROR to the Circuit Court of Guernsey county.

J. B. Ferguson, for plaintiffs in error.

W. W. Stewart, for defendants in error.

Judgment against George Allender reversed and judgment as to Lydia A. Allender, and order of sale affirmed.

Causes not reported in full.

No. 6962.

EDRICH ET AL. v. SHRIVER.

(Decided June 4, 1901.)

ERROR to the Circuit Court of Huron county.

G. H. Withey; Andrews Bros. and Stephen M. Young, for plaintiffs in error.*B. B. Wood and J. R. McKnight*, for defendant in error.

Judgment affirmed.

SPEAR, DAVIS and SHAUCK, JJ., concur.

BURKET, J., absent.

No. 6999.

MANNER ET AL. v. MANNER ET AL.

(Decided June 4, 1901.)

ERROR to the Circuit Court of Richland county.

H. T. Manner and Cummings & McBride, for plaintiffs in error.*J. M. Reed and L. C. Mengert*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and SHAUCK, JJ., concur.

BURKET, J., absent.

Memoranda of

No. 7002.

COLLINS, ADMRX., v. RAILWAY COMPANY.

(Decided June 4, 1901.)

ERROR to the Circuit Court of Guernsey county.

J. B. Ferguson, for plaintiff in error.

Mathews, Heade & Mathews, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and
SHAUCK, JJ., concur.

BURKET, J., absent.

No. 7009.

MCCLURE v. KIRKENDALL.

(Decided June 4, 1901.)

ERROR to the Circuit Court of Putnam county.

Bailey & Bailey, for plaintiff in error.

Krauss & Eastman, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and
SHAUCK, JJ., concur.

BURKET, J., absent.

No. 7010.

GRAY, AUDITOR, ET AL., v. STEWART.

(Decided June 4, 1901.)

ERROR to the Circuit Court of Butler county.

Causes not reported in full.

Warren Gard, for plaintiffs in error.

Stephen Crane, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., SPEAR, DAVIS and SHAUCK, JJ.,
concur.

BURKET, J., absent.

No. 7011.

MCCLURE, ADMR., v. POPE.

(Decided June 4, 1901.)

ERROR to the Circuit Court of Putnam county.

Bailey & Bailey, for plaintiff in error.

Watts & Moore, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and
SHAUCK, JJ., concur.

BURKET, J., absent.

No. 7016.

DOUGLAS v. DOUGLAS.

(Decided June 4, 1901.)

ERROR to the Circuit Court of Tuscarawas county.

E. E. Lindsay and *J. H. Mitchell*, for plaintiff in
error.

John A. Buchanan, for defendant in error.

Memoranda of

Judgment affirmed on authority of *Fulton v. Fulton*, 52 Ohio St., 229.

MINSHALL, C. J., WILLIAMS and DAVIS, JJ.,
concur.

BURKET and SPEAR, JJ., absent.

No. 7027.

HOOVER v. SHERWOOD.

(Decided June 4, 1901.)

ERROR to the Circuit Court of Crawford county.

Edward Vollrath, for plaintiff in error.

Horace Holbrook, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., SPEAR, DAVIS and SHAUCK, JJ.,
concur.

BURKET, J., absent.

No. 7372.

MORIARITY, ADMRX., v. RAILWAY COMPANY.

(Decided June 4, 1901.)

ERROR to the Circuit Court of Allen county.

Crist & Crist and *Cable & Parmenter*, for plaintiff
in error.

I. R. Longworth and *R. D. Marshall*, for defend-
ant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, SPEAR, DAVIS and
SHAUCK, JJ., concur.

BURKET, J., absent.

Causes not reported in full.

No. 6377.

MORRISON *v.* EQUITABLE NATIONAL BANK.

(Decided June 11, 1901.)

ERROR to the Superior Court of Cincinnati.

Harmon, Colston, Goldsmith & Hoadly and Spotswood D. Bowers, for plaintiff in error.

Sayler & Sayler, for defendant in error.

Judgment affirmed.

WILLIAMS, BURKET and SPEAR, JJ., concur.

No. 6692.

PISTORIUS *v.* BELL.

(Decided June 11, 1901.)

ERROR to the Circuit Court of Hamilton county.

O'Hara & Jordan and John S. Conner, for plaintiff in error.

Peck, Shaffer & Peck, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 6886.

RAFFERTY *v.* TOLEDO TRACTION COMPANY.

(Decided June 11, 1901.)

ERROR to the Circuit Court of Lucas county.

Memoranda of

Hurd, Brumback & Thatcher, for plaintiff in error.
Smith & Baker, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
 DAVIS and SHAUCK, JJ., concur.

No. 6997.

ALLEN v. MARVIN, ADMR.

(Decided June 11, 1901.)

ERROR to the Circuit Court of Portage county.

J. H. Nichols, for plaintiff in error.

I. T. Siddall, for defendant in error.

Judgment of circuit court reversed and that of the
 common pleas affirmed.

MINSHALL, C. J., BURKET, DAVIS and SHAUCK, JJ.,
 concur.

No. 7007.

KING ET AL. v. ROOSE.

(Decided June 11, 1901.)

ERROR to the Circuit Court of Richland county.

Jenner & Weldon, for plaintiffs in error.

Cummings & McBride and *Douglass & Mengert*, for
 defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
 DAVIS and SHAUCK, JJ., concur.

Causes not reported in full.

No. 7041.

GREENE, EXECUTRIX, v. TRUSTEES YORK TOWNSHIP.

(Decided June 11, 1901.)

ERROR to the Circuit Court of Sandusky county.

B. A. Hayes, for plaintiff in error.*Jesse Vickery*, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, DAVIS and SHAUCK,
JJ., concur.

BURKET and SPEAR, JJ., absent.

No. 7044.

PACKARD ET AL. v. CANFIELD ET AL.

(Decided June 11, 1901.)

ERROR to the Circuit Court of Fulton county.

F. D. Prentis and *W. W. Campbell*, for plaintiffs in error.*D. B. Morgan* and *Everett & Paxson*, for defendants in error.

Judgment reversed and common pleas affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

No. 7413.

RAILWAY COMPANY v. FINDLEY.

(Decided June 11, 1901.)

ERROR to the Circuit Court of Warren county.

Memoranda of

James R. Foraker and Runyan & Stanley, for plaintiff in error.

Harrison & Aston and M. A. Jameson, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS and BURKET, JJ., concur.

No. 7588.

STATE EX REL. ATTORNEY GENERAL *v.* RUNYAN.

(Decided June 11, 1901.)

Proceedings in contempt. Guilty as charged.

J. M. Sheets, Attorney General, and *J. E. Todd*, Assistant Attorney General, for plaintiff.

Booth, Keating & Peters, for defendant.

Sentence, \$250 fine and ten days imprisonment and costs of suit, and to stand committed until fine and costs are paid.

DAVIS and SHAUCK, JJ., are of opinion that the term of imprisonment is too short in view of the gravity of the offense, and that in view of the doctrine of *Hale v. State*, 55 Ohio St., 210, the power of the court in that regard is not restricted by any valid statute.

SPEAR, J., absent.

No. 7589.

STATE EX REL. ATTORNEY GENERAL *v.* STEELE.

(Decided June 11, 1901.)

Proceedings in contempt. Not guilty as charged.

Causes not reported in full.

J. M. Sheets, Attorney General, and *J. E. Todd*,
Assistant Attorney General, for plaintiff.

Jerry Dennis, for defendant.

Discharged.

MINSHALL, C. J., WILLIAMS and BURKET, JJ.,
concur.

DAVIS and SHAUCK, JJ., dissent.

SPEAR, J., absent.

No. 6631.

CITY OF TOLEDO *v.* RUSSELL.

(Decided June 18, 1901.)

ERROR to the Circuit Court of Lucas county.

M. R. Brailey and *Charles K. Friedman*, for plain-
tiff in error.

Chittenden & Chittenden, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS and BURKET, JJ.,
concur.

No. 7020.

HEINMAN *v.* TIPPERY.

(Decided June 18, 1901.)

ERROR to the Circuit Court of Richland county.

Douglass & Mengert, for plaintiff in error.

Cummings & McBride, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR,
DAVIS and SHAUCK, JJ., concur.

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No. 7037.

RAILWAY COMPANY v. BALDWIN.

(Decided June 18, 1901.)

ERROR to the Circuit Court of Cuyahoga county.

Dickey, Brewer & McGowan, for plaintiff in error.

J. F. Herrick and Herrick & Hopkins, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 7038.

STEWART v. KERN.

(Decided June 18, 1901.)

ERROR to the Circuit Court of Sandusky county.

Jesse Vickery; Bentley & Vickery; John S. Williams and Kinney & O'Farrell, for plaintiff in error.

James B. Miller and Garver & Garver, for defendant in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, DAVIS and SHAUCK, JJ., concur.

No. 7055.

HAMLIN v. YOUNG.

(Decided June 18, 1901.)

ERROR to the Circuit Court of Hancock county.

Causes not reported in full.

John M. Hamlin; Pendleton & Whiteley and Shafer & Shafer, for plaintiff in error.

J. A. & E. V. Bope, for defendant in error.

Judgment vacated and cause remanded to the circuit court with directions to consider the bill of exceptions.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 7080.

BINGHAM v. LEDERMAN ET AL.

(Decided June 18, 1901.)

ERROR to the Circuit Court of Marion county.

Scofield, Durfee & Scofield, for plaintiff in error.

J. F. McNeal & Sons, for defendants in error.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET and DAVIS, JJ., concur.

No. 7218.

SOHN v. CITY OF CIRCLEVILLE.

(Decided June 18, 1901.)

ERROR to the Circuit Court of Pickaway county.

Abernethy & Folsom; John Schleyer and Charles Gerhardt, for plaintiff in error.

C. A. Leist, City Solicitor, and *Clarence Curtain*, for defendant in error.

Memoranda of

Judgment affirmed on the opinion of Cherrington, J., in *Circleville v. Sohn*, 11 Circ. Dec., 193 (20 R., 368).

MINSHALL, C. J., BURKET, DAVIS and SHAUCK, JJ.,
concur.

No. 7407.

RAILWAY COMPANY v. ANDREWS, ADMR.

(Decided June 18, 1901.)

ERROR to the Circuit Court of Lucas county.

Emery D. Potter; George C. Greene and F. J. Jerome, for plaintiff in error.

J. Kent Hamilton and George B. Boone, for defendant in error.

Judgment reversed on authority of same case, 58 Ohio St., 426.

MINSHALL, C. J., BURKET, DAVIS and SHAUCK, JJ.,
concur.

No. 7427.

STREETS WESTERN STABLE CAR LINE v. GUILBERT,
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(Decided June 18, 1901.)

ERROR to the Circuit Court of Franklin county.

Percy Werner and Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error.

J. M. Sheets, Attorney General; *J. E. Todd*, Assistant Attorney General, and *Smith W. Bennett*, for defendant in error.

Judgment affirmed on authority of *Express Co. v. State*, 55 Ohio St., 69.

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2. *Section 5555, Rev. Stat., not applicable. when*—The provisions of Sec. 5555, Rev. Stat., that "if there is not enough" (of the attached property) "to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue, in all respects as in other cases" cannot, consistently with constitutional guaranties, have application to cases where the defendant in attachment is a resident of another state, over whom the court has obtained no jurisdiction otherwise than by publication of notice according to the statute. *Oil Well Supply Co. v. Koen*, 422.
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power, and is decisive in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or executive department. *Ib.*

3. *Proceeding in court comprehends complaint, process and inquiry according to established rules*—The institution and prosecution of a proceeding in a court, comprehends the filing of a proper complaint, process for bringing in the proper parties, and a judicial inquiry according to established rules and practice. *Ib.*
4. *Exercise of a judicial function—Order or judgment to be progressively enforced*—Where the law confers a right, and authorizes an application to a court of justice for the enforcement of that right, the proceeding upon such application is the exercise of a judicial function, though the order or judgment authorized be of such a nature that it can only be performed, or its execution enforced, progressively during a future period. *Ib.*

Probate court has complete jurisdiction to direct mode of the use of streets by telephone company under Sec. 3461, Rev. Stat.—See *STREETS*.

Court requested by each party to instruct jury in its favor thereby clothed with functions of jury—Verdict in such case—See *TRIAL*.

Power to make order for use of streets by telephone company, as provided in Sec. 3461, Rev. Stat., not inappropriately conferred on probate courts and not unconstitutional—See *STREETS*.

Cannot order deputy state supervisors of elections to perform an act contrary to decision of state supervisor—See *ELECTIONS*.

Action before justice of the peace involving equitable defenses restrained by injunction—Jurisdiction in equity—See *ACTION OR SUIT*.

Common pleas has jurisdiction to vacate assignment for creditors—Probate has not—See *ASSIGNMENT FOR CREDITORS*.

Decennial boards of equalization may exercise discretion and cannot be controlled by court or other officers—See *BOARD OF EQUALIZATION*.

Ohio courts—Jurisdiction for wrongful killing in another state—See *WRONGFUL DEATH*.

COVENANTS—

Equity cannot compel performance of covenant of indemnity prior to conditional contingency—Rule applied to indemnity in favor of sureties on replevin bond—See *SPECIFIC PERFORMANCE*.

Criminal Law—Decennial Board of Equalization.

CRIMINAL LAW—

Indictment for burglary under Sec. 6835, Rev. Stat., as amended 82 O. L., 161—See **BURGLARY**.

Requirement in indictments of words "against the peace and dignity of the state of Ohio"—See **INDICTMENTS**.

DAMAGES—

Action by farm owner against telegraph company for cutting trees along highway—Oral license not authorized by landlord—Defeats or mitigates exemplary damages but not compensation—See **LANDLORD AND TENANT**.

Only damages recoverable for usurpation of office are emoluments or salary during time unlawfully withheld—See **OFFICES AND OFFICERS**.

Failure to state cause of action for damages for breach of contract of warranty in sale of goods by sample—Erroneous instructions as to measure of recovery—See **SALES**.

Contract for use of patent right that in case of use after term licensee shall pay double license fee, not unlawful, but is liquidated damages and may be recovered as such on breach of agreement—See **CONTRACTS**.

Action before justice of the peace involving equitable defenses, including injunction against the sale of family relics, etc., the loss of which cannot be compensated in damages, restrained by injunction—See **ACTION OR SUIT**.

DEATH—See **WRONGFUL DEATH**.

DEBENTURE COMPANIES—

Device containing elements of chance constituting lottery—See **LOTTERIES**.

DEBTORS AND CREDITORS—

Mortgage of real property not delivered to recorder prior to appointment of receiver for mortgagor not a valid lien and creditors are entitled to proceeds of sale of mortgaged premises—See **LIENS**.

Distribution of funds or securities deposited with superintendent of insurance—See **INSURANCE**.

Contingent interest of wife in policy of insurance not a separate estate chargeable with payment of obligation of husband and wife—See **HUSBAND AND WIFE**.

See also **ASSIGNMENTS FOR CREDITORS; ATTACHMENT**.

DECENNIAL BOARD OF EQUALIZATION—See **BOARD OF EQUALIZATION**.

Decrees—Descent and Distribution.

DECREES—

As to alimony not subject to modification, when—See **DIVORCE AND ALIMONY**.

DEEDS—

Trust engrafted on deed absolute may be shown by parol; must be contemporaneous with deed—Evidence must be clear, etc.—See **TRUSTS**.

Possession by purchaser under sheriff's deed for over forty years prior to action by heirs of mortgagor—Right of reformation—See **MORTGAGES**.

DEEDS OF ASSIGNMENT—See **ASSIGNMENTS FOR CREDITORS**.

DEFENSES—

Involving equitable relief in actions before justices of the peace—Injunction to restrain action—See **ACTION OR SUIT**.

Former recovery not available as plea in bar where court was without jurisdiction—See **PLEADING**.

DEPOTS—

Degree of care required of employes in crossing tracks at—See **NEGLIGENCE**.

Railroad station platform—Liability and duty of railway company incident to guarding—See **RAILROADS**.

DEPUTY STATE SUPERVISORS OF ELECTIONS—

Decision of state supervisor of elections on matters submitted by deputies, final—See **ELECTIONS**.

Not a board or body corporate but act separately; and suit should be in that capacity; may prosecute error though others refuse to join—See **ELECTIONS**.

DESCENT AND DISTRIBUTION—

1. *Rule as to descent of real property does not apply to personal property—Section 4162, Rev. Stat.—Descent of estate by former husband or wife—Where personal property is mingled with common fund which is to follow statute—The rule which prevails as to real property, that descent follows the legal title, does not apply to personal property; and where the owner of personal property, intending and desiring that it shall descend, upon the death of such owner, according to the provisions of Revised Statutes, section 4162, mingles the same in a common fund with property which is specifically within the terms of said section, and makes a*

 Descent and Distribution—Ditches and Drains.

DESCENT AND DISTRIBUTION—(Continued.)

partial distribution in accordance with such intention and desire, such funds is impressed with a trust that it shall so descend, and upon the death of the owner such fund will descend according to the provisions of section 4162.

Bruer v. Johnson, 7.

2. *Descent of real property controlled by legal title*—The course of descent of real property is controlled by the legal title. *Russell v. Bruer*, 1.

TRUSTS—

Engrafting trust upon absolute deed—See **TRUSTS**.

DEVISES—See WILLS.**DIPLOMAS—**

Mandamus will not issue to compel state board of medical registration to recognize college or issue certificate on diplomas—See **COLLEGES**.

DISCOVERY—

Action at law before justice of the peace involving equitable defenses, including discovery—Restrained by injunction—See **ACTION OR SUIT**.

DISMISSAL—

Failure otherwise than upon merits—Secs. 4983 and 4991—See **LIMITATION OF ACTIONS**.

DISTRICT ASSESSORS—See ASSESSORS.**DITCHES AND DRAINS—**

1. *Exemptions of Sec. 2380, Revised Statutes, from sewer assessments—Applicable where*—Section 2380 of the Revised Statutes, and the exemptions of property from assessments for sewers as therein provided, are applicable where the assessment is levied for the construction of a main sewer in a city of the third grade of the first class. *Ford v. Toledo*, 92.

2. *Local drainage defined*—The "local drainage" contemplated by that provision, is that which provides the lot or land with adequate drainage for the necessary and usual purposes of sewerage; and it is not enough, to entitle a lot or land to exemption from assessment, that it is provided with sufficient surface drainage, or does not need drainage of that kind. *Ib.*

Ditches and Drains—Educational Institutions.

3. *Vacant lots receiving benefit from adjacent sewer subject to assessment, when*—Where the lot or land is in need of local drainage, it is not exempt because it is entirely unimproved, and there is no immediate need for such drainage. Vacant lots and lands may, and usually do receive a present special appreciable benefit from the construction of a sewer in proximity with, and accessible by them for sewerage purposes, sufficient to sustain an assessment made on the basis of benefits. *Ib.*
4. *County ditches—Amount to be paid by upper to lower county—Section 4510-3, Revised Statutes—Error will not lie to action of the probate court appointing freeholders, when*—Error will not lie to the action of the probate court appointing freeholders, as provided by section 4510-3 of the Revised Statutes, to estimate and report the amount which should be paid by the upper to the lower county, for the benefits of an outlet ditch. *Commissioners (Fulton Co.) v. Comrs. (Henry Co.)*, 180.

DIVORCE AND ALIMONY—

Divorce to wife for aggression of husband—Alimony adjudged wife by agreement of parties—Terms of alimony agreement not subject to modification upon petition filed by husband, when—A divorce being decreed for the aggression of the husband, and alimony being adjudged to the wife in accordance with an agreement of the parties, the terms of the decree as to alimony are not, if unaffected by fraud or mistake, subject to modification upon a petition filed by the former husband after the term at which the original decree was made. *Law v. Law*, 369.

DOW LAW—

Authority to enter omitted taxes on liquor business not restricted to current year—Act 94 O. L., 133—See TAXATION.

DRAINS—See DITCHES AND DRAINS.

DUES—See BUILDING ASSOCIATIONS.

EDUCATIONAL INSTITUTIONS—

Person not of blood of testator designated heir under Sec. 4182, Rev. Stat., not issue of the body within Sec. 5915, Rev. Stat., and charitable, etc., bequests not void on account of—See WILLS.

Election—Equity.

ELECTION—

Filing answer and cross-petition by building association as mortgagee in action by assignee to sell land not an election to forfeit stock which will estop association from claiming fines, etc.—See **ASSIGNMENTS FOR CREDITORS**.

ELECTIONS—

1. *Decisions of state supervisor of elections on matter submitted by deputies final*—The decision of the state supervisor of elections as to matters in controversy submitted to him by the deputy state supervisors, is final. It is the duty of such deputy state supervisors to obey such decision of the state supervisor of elections; and it is error for a court, by mandamus or otherwise, to order such deputy state supervisors to perform an act contrary to such decision of the state supervisor of elections. *Randall v. State ex rel.*, 57.
2. *Mandamus to compel deputy to print names on ballot—State supervisor not a party*—Action cannot compel act contrary to his decision—In a proceeding in mandamus to compel the deputy state supervisors to print names of candidates for office upon the official ballot, the state supervisor is not a proper party. And such action cannot be maintained to compel the performance of an act contrary to the decision of the state supervisor in the premises. *Ib.*
3. *Deputy supervisors not a board or corporate body—Legal status of*—The deputy state supervisors are not constituted a board, or corporate body by the statute, but each one acts simply as a deputy state supervisor, and in case of litigation the action should be against him in that capacity, and he may prosecute error, even though the others refuse to join with him. *Ib.*

ELECTRIC RAILWAYS—See **STREET RAILWAYS**.

EMINENT DOMAIN—

Status of municipal corporation as to streets—Compensation from telephone company sufficient to keep same in repair—Need not be assessed by jury—May construct under order of probate under Secs. 3454, 3461-1 and 3471—See **STREETS**.

EQUITY—

Cannot compel performance of contract of indemnity in advance of conditional event—Rule applied to indemnity in favor of sureties on replevin bond—See **SPECIFIC PERFORMANCE**.

Equity—Execution.

Defense in action before justice of the peace involving equitable relief—Separate action in equity—Injunction to restrain action before justice—See ACTION OR SUIT.

ERROR—

1. *Judgment upon conceded facts may be reviewed without motion for new trial*—Where the facts are conceded or agreed upon in a trial, the judgment of the court rendered upon such facts, may be reviewed in a higher court by petition in error, without a motion for a new trial. *In re Est. Hinton*, 485.

2. *Plaintiff in error—Joined as defendant in error—Resorts to cross-petition—Must file brief, when—Supreme Court practice*—Where one who would properly be a plaintiff in error is joined as a defendant in error and seeks by a cross-petition in error to accomplish the same purpose that is sought by the petition in error he is amenable to the rule which requires that his brief must be filed within five months of the filing of the petition in error. *Pratt v. Walworth*, 123.

Deputy state supervisors of elections not a board or body corporate; each acts separately and one may prosecute error though others refuse to join—See ELECTIONS.

ESTOPPEL—

Filing answer and cross-petition by building association as mortgagee in action by assignee to sell land not an election to forfeit stock which will estop association from claiming fines, etc.—See ASSIGNMENTS FOR CREDITORS.

EVIDENCE—

Trust engrafted upon deed absolute may be shown by parol; must be contemporaneous with deed—Evidence must be clear, etc.—See TRUSTS.

Party who signs note so as to indicate *prima facie* that he was original promisor may show that he was guarantor, when—See BILLS AND NOTES.

Conceded facts prevail over general allegations—See PLEADING.

EXECUTION—

Section 5555, Rev. Stat., that "if there be not enough" (of the attached property) "to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue, in all respects as in other cases" cannot be applied where de-

Execution—Forfeit Money.

EXECUTION—(Continued.)

defendant is a nonresident and jurisdiction is obtained only by publication—See ATTACHMENT.

No valid judgment *in personam* can be rendered in attachment against a nonresident who has not been summoned nor appeared, on which execution can issue, notwithstanding service by publication—See ATTACHMENT.

EXECUTIVE POWER—See POWERS.

EXEMPLARY DAMAGES—See DAMAGES.

EXEMPTIONS—

From sewer assessments under Sec. 2380, Rev. Stat.—Applicable where—See DITCHES AND DRAINS.

FALSE IMPRISONMENT—

Commencement of action—Failure otherwise than upon merits—Secs. 4983 and 4991, Rev. Stat.—See LIMITATION OF ACTIONS.

FAMILY RELICS—

Injunction against disposal—Jurisdiction in equity—Injunction to restrain action at law before justice of the peace—See ACTION OR SUIT.

FEDERAL COURTS—

Commencement of action—Failure otherwise than upon merits—Secs. 4983 and 4991, Ohio Rev. Stat.—See LIMITATION OF ACTIONS.

FINES—See BUILDING ASSOCIATIONS.

FORECLOSURE—See MORTGAGES.

FOREIGN CORPORATION—

When charter, franchise or power of corporation are the foundation of an action, the same should be specially pleaded. In case of foreign corporations, the state granting should appear—See CORPORATIONS.

FOREIGN STATUTES—See WRONGFUL DEATH.

FORFEIT MONEY—

Deposit with county board at request of bidders on bonds—Burden of loss from mistake in instructions—See BONDS.

Forfeiting Stock—Guardian and Ward.

FORFEITING STOCK—

By member building and loan association—See **ASSIGNMENTS FOR CREDITORS**.

FORMER RECOVERY—See **PLEADING**.

FRANCHISES—

Where charter, franchise or powers become foundation of the action against corporation, the same should be specially pleaded. In case of foreign corporation, name of state granting should appear—See **CORPORATION**.

FRAUD—

Common pleas has jurisdiction to set aside assignment for creditors for fraud—Probate has not—See **ASSIGNMENT FOR CREDITORS**.

Device containing elements of chance are unlawful—See **LOTTERIES**.

FREEHOLDERS—

County ditches—Sec. 4510-3, Rev. Stat. Error will not lie to order of probate appointing, when—See **DITCHES AND DRAINS**.

FREIGHT—See **STREET RAILWAYS**.

GENERAL BONDS—

Rule as to rights and liabilities of sureties on general and special bond as to proceeds of indemnity mortgage by defaulting guardian—See **PRINCIPAL AND SURETY**.

GUARDIAN AND WARD—

1. *Guardian gave general and special bonds—Secs. 6259 and 6285, Rev. Stat.—Also gave real estate mortgage—Sureties on general bond insolvent—On special bond solvent—Rule as to credits from proceeds of sale—A guardian upon his appointment gave a general bond with three sureties under section 6259, Revised Statutes, and afterward gave a special bond with two sureties for the sale of real estate under section 6285, Revised Statutes, and later died insolvent and a defaulter to his ward in a large sum received on the sale of real estate and from other sources, having commingled the funds and used them as his own; before his death he gave a mortgage on his real estate to his sureties on both bonds for their indemnity; after his death his administrator sold the real estate upon petition in the probate court to pay debts, and by order of that court paid the net proceeds to the wards,*

GUARDIAN AND WARD—(Continued.)

and they applied the whole of it upon the liability of the general bond, and the sureties on that bond being insolvent, and the sureties on the special bond being good. In an action by each ward upon the special bond for his share thereof, the bond being largely in excess of the amount received on the sale of the real estate, the courts below held that the sureties on both bonds were cosureties for the amount of the guardian's default, and that each surety was entitled to have one-fifth of the amount realized under the mortgage applied as a credit on his liability on the bond signed by him, and that sum being greater than the liability of the two sureties on the special bond, rendered judgment in favor of the two sureties and dismissed the petition. *Held*, that this was error; that the sureties on both bonds were cosureties only to the extent of the proceeds of the sale of the real estate; that the two sureties on the special bond were entitled to have the sum realized from the indemnity mortgage credited upon their liability in proportion of the liability under the special bond for funds received on sale of real estate to the liability under the general bond for funds not so received. *Swisher v. McWhinney*, 343.

2. *Rule of calculation of interest upon amount so realized from sale*—Interest should be calculated upon the amount realized by the guardian on the sale of the real estate with annual rests to the date of his death, and thereafter at simple interest without such rests to the rendition of the judgment. *Ib.*
3. *Distributive share to wards from realty sale*—Where the wards own the real estate in equal shares, the money realized from the special bond given on the sale of such real estate should be equally divided among them, even though the amount due to the several wards by reason of other funds received by the guardian, may be unequal. *Ib.*

GUARANTOR—

Party signing note so as to indicate *prima facie* that he was original promisor may show that he was guarantor, when—See **BILLS AND NOTES**.

GUARANTY—

One who is ostensibly joint maker of note but was in fact surety—Makers not released from liability to indemnify because suretyship or guaranty was made without their knowledge—See **BILLS AND NOTES**.

Heirlooms—Husband and Wife.

HEIRLOOMS—

Injunction against disposal—Jurisdiction in equity—Injunction to restrain action at law before justice of the peace—
See ACTION OR SUIT.

HEIRS—

Person not of blood of testator who has been designated heir under Sec. 4182, Rev. Stat., not issue of the body within Sec. 5915, Rev. Stat.—See WILLS.

In construction of will made prior to abrogation of the rule in Shelley's case—See WILLS.

HIGHWAYS—

Action by farm owner against telegraph company for cutting trees along highway—Oral license, not authorized by landlord—Defeat or mitigated recovery of exemplary damages but not compensation—See LANDLORD AND TENANT.

Amendment to Sec. 4812, Rev. Stat., 83 O. L., 85, passed April 17, 1886, retroactive and void as to pikes constructed before its passage—See TAXATION.

Sections 4814 and 4815, Rev. Stat., not applicable, when—See TAXATION.

HUSBAND AND WIFE—

Wife and husband execute written instrument to lender—Insurance policy on life of husband payable to wife—At death of husband wife received and invested amount in house—Payee of note seeks remedy in wife's home property—But at time of execution of note, wife's liability only on separate estate—Property subsequently acquired not liable—Contingent interest of wife in policy not chargeable with payment of note.

In 1876, a married woman, with her husband, executed a written instrument acknowledging the loan of a sum of money to them which they promised to repay to the lender, at any time, with interest. Prior thereto a policy of insurance on the life of the husband had been obtained on the joint application of himself and wife, which, upon performance of the usual conditions contained in such policies, was payable on proper proof of loss, to the wife, or in the event of her death prior to that of the husband, to his children share and share alike, or in the event of no children, to his legal representatives. He paid the premiums until within a year of his death, and those which accrued during that year were paid by her from her personal

HUSBAND AND WIFE—(Continued.)

earnings. He died in 1880, when the insurance was paid to her, and she invested the money in a home. She was at no time the owner of any other property. Several years afterward the holder of the written instrument brought suit against her thereon, in which a personal judgment was the only relief prayed for, though the petition alleged that she was the owner of separate property, which she intended to, and did, charge with the payment of the obligation. *Held:*

1. That the instrument, under the law in force when it was executed, created no legal liability on which a personal judgment could be rendered against the defendant. The extent of her contractual capacity was to charge any separate estate which she might have, and the remedy was to pursue such property in equity. *Stricken v. Schmidt*, 354.
2. The ownership of separate property when the contract was entered into, was essential to the establishment of an intention to create a charge thereon. Property thereafter acquired did not become bound for the previous engagement, nor did such after acquisition give validity to the promise made when the defendant was not the owner of separate property. *Ib.*
3. The contingent interest of the defendant in the insurance policy on the life of her husband, at the time the instrument was executed, did not constitute her separate property, chargeable in equity with the payment of that instrument; nor did the money thereafter collected on the policy, by relation, become so chargeable. *Ib.*

Descent of estate by former husband and wife—See DESCENT AND DISTRIBUTION.

See also DIVORCE AND ALIMONY.

IN PARI MATERIA—

Statutes of other states—Construction—Ohio courts—Jurisdiction over wrongful killing in another state—See WRONGFUL DEATH.

IN PERSONAM—

No valid judgment *in personam* can be rendered in attachment against nonresident who has not appeared or been summoned—See ATTACHMENT.

IN REM—See ATTACHMENT.**INDIANA—**

Ohio courts have not jurisdiction of suit for wrongful killing in Indiana—See WRONGFUL DEATH.

Indemnity—Insolvency.

INDEMNITY—

Equity cannot compel performance of covenant of indemnity prior to happening of conditional contingency—Rule applied to indemnity in favor of sureties on replevin bond—See **SPECIFIC PERFORMANCE**.

Rule as between joint makers of note and guarantor—See **BILLS AND NOTES**.

INDEMNITY MORTGAGE—

Rule as to rights and liabilities of sureties on general and special bonds of defaulting guardian, as to proceeds of mortgage of indemnity—See **PRINCIPAL AND SURETY**.

INDICTMENTS—

Requirement in indictments of words "against the peace and dignity of the state of Ohio"—The constitution requires that all indictments shall conclude with the words "against the peace and dignity of the state of Ohio," but those words are not required to be at the conclusion of each count of an indictment. *Olendorf v. State*, 118.

See also **BURGLARY**.

INFANTS—See **PARENT AND CHILD**.

INJUNCTION—

Action to enjoin levy or collection can only be maintained by taxpayer—See **ACTION OR SUIT**.

Lies to restrain action at law before justice of the peace which involves equitable defenses, discovery and accounting, including injunction against disposal of family relics—See **ACTION OR SUIT**.

INSOLVENCY—

Sureties on replevin bond have no remedy on contract of indemnity until loss occurs, nor has defendant in replevin, though sureties and judgment debtor are insolvent and judgment is otherwise uncollectible—See **SPECIFIC PERFORMANCE**.

Securities deposited with the superintendent of insurance cannot be recovered by assignee of company without showing that company is no longer liable to policy holders—Distribution in such cases—See **INSURANCE**.

Personal property of insolvent corporation being held and operated by assignee as a going business subject to taxation; assignee should list—See **TAXATION**.

See also **ASSIGNMENTS FOR CREDITORS**.

Insolvent Corporation—Investment Companies.

INSOLVENT CORPORATION—

Order appointing receiver which embraces real estate; not invalid because petition and motion do not in terms refer to such property—See RECEIVERS.

INSTRUCTIONS TO JURY—See CHARGE TO JURY.

INSURANCE—

1. *Securities deposited by insurance company with superintendent of insurance—Can only be recovered by assignee, when—* Where securities have been deposited with the superintendent of insurance, by an insurance company, to be held by such superintendent in trust for the benefit and protection of, and as security for, the policy holders of such company, the assignee of such company, under our insolvent laws, cannot recover such securities from such superintendent without first showing that such company is no longer liable to any of its policy holders. *State ex rel v. Matthews*, 419.

2. *Duty of insurance superintendent in distributing such deposit—*It is the official duty of such superintendent, in the event that such company becomes insolvent, to act, and perform his trust, by distributing the funds so deposited with him, *pro rata*, among the several policy holders, and when their just claims shall all be satisfied, to pay the balance, if any, to the company, or its assignee or other successor. *Ib.*

Contingent interest of wife in insurance upon life of husband not her separate property chargeable in equity with payment of obligation of husband and wife—See HUSBAND AND WIFE.

INTEREST—

Rule as to calculation of interest upon moneys received by defaulting guardian—See GUARDIAN AND WARD.

To be excluded from amount of judgment under Sec. 670, Rev. Stat.—See JUDGMENTS.

INTERURBAN RAILWAYS—See STREET RAILWAYS.

INTOXICATING LIQUORS—

Authority to enter omitted taxes on liquor business—Not restricted to current year—Act 94 O. L., 153—Dow law—See TAXATION.

INVESTMENT COMPANIES—

Device containing elements of chance and constituting lottery—See LOTTERIES.

Issue of the Body—Judgment.

ISSUE OF THE BODY—

Person not of the blood of the testator, designated heir under Sec. 4182, Rev. Stat., not issue of the body within Sec. 5915, Rev. Stat.—See WILLS.

ISSUES—

Stipulation that law in one case shall control others "except as to certain matters of fact upon which issues may be joined herein" does not preclude parties from raising other issues—See JUDGMENTS.

JUDGES—

Subdivision 7, Sec. 5190, Rev. Stat., requires judge to give general instructions to jury after argument—See CHARGE TO JURY.

JUDGMENT—

1. *Power of common pleas to set aside its judgment—May do so by consent, when*—The court of common pleas having by statute authority to set aside its judgments at a subsequent term, such judgments may be set aside by the consent of both parties without statement of the grounds for such action. *National Home v. Overholser*, 517.
2. *Vacation of judgment—Section 5360, Rev. Stat.—Order for vacation may be erroneous but not void, when*—Although an order for the vacation of a judgment rendered at a former term without adjudging that there is a valid defense to the action in which the judgment was rendered is erroneous in view of the requirement of section 5360, Revised Statutes, it is not void. *Newman v. Desnoyers*, 447.
3. *"Interest" to be excluded from amount of judgment under section 6710, Rev. Stat., defined*—Under section 6710, Rev. Stat., as amended April 25, 1898, 93 Laws, 255, the "interest" that is to be excluded from the amount of the judgment in ascertaining the jurisdiction of the court, is the interest that may have accrued on the judgment, and not that which may have been included in it at the time it was rendered. *Toledo v. Buechell*, 389.
4. *Pleadings—Two or more actions pending—Stipulation that law in one shall control all—Effect*—Where there are two or more actions pending, and pleadings are made up as to certain issues, and the parties stipulate that the law as finally held in the one case tried, shall control in the other cases, and be conclusive as to all matters in the cases not yet

Judgment—Judicial Sales.

JUDGMENT—(Continued.)

tried, "except as to matters of fact upon which issue may be joined therein," such stipulation does not preclude either party, after the one case has been finally disposed of, from raising other issues of fact by proper pleadings, on leave of the court. *Swisher v. McWhinney*, 343.

Section 5555, Rev. Stat., that "if there be not enough" (of the attached property) "to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue, in all respects as in other cases," cannot be applied where defendant is a non-resident and no jurisdiction obtained except by publication—See ATTACHMENT.

Judgments in attachment against non-residents not served except by publication for amount beyond property attached acquire no additional force from Sec. 5355, Rev. Stat., authorizing party to have judgment opened up or from failure to pursue that remedy—See ATTACHMENT.

No valid judgment *in personam* can be rendered against a non-resident in attachment who has not appeared or been summoned notwithstanding service by publication—See ATTACHMENT.

Action by attachment against non-resident who has appeared or been summoned is *in rem* and has no effect beyond property attached—See ATTACHMENT.

Former recovery not available as plea in bar where court was without jurisdiction—See PLEADING.

Upon conceded facts judgment may be reviewed without motion for a new trial—See ERROR.

Exercise of judicial function—Order or judgment to be progressively enforced—See COURTS.

Decree as to alimony not subject to modification, when—See DIVORCE AND ALIMONY.

JUDICIAL POWER—

Power conferred on court of justice controls in fixing judicial character of power, when—See COURTS.

See POWERS.

JUDICIAL SALES—

Land bid in at sheriff's sale by appraiser, preventing others from bidding—Sale may be set aside—Though purchase money is paid into court and deed delivered—Where land has been bid in at sheriff's sale, by one who, unknown to the judgment debtor, owner of the land, had served as appraiser, and it is shown besides, that such bidder undertook to prevent others from bidding at the sale, and that the land

 Judicial Sales—Justices of the Peace.

brought less than its probable value, such sale will, on the petition of the judgment debtor, be set aside and a new sale ordered even though the purchase money has been paid into court and distributed, a deed delivered by the sheriff, and no guaranty is afforded that the land will bring more at a resale. *Hurst et al. v. Fisher et al.*, 530.

Land mortgaged by life devisee in fee simple—Foreclosure and order of sale—Sheriff's deed—Purchaser's possession for over forty years—Action by heirs of mortgagor—Sheriff's deed conveyed legal title—See MORTGAGES.

JURISDICTION—

Probate court has complete jurisdiction of a proceeding under Sec. 3461, Rev. Stat., to direct the mode of use of streets by a telephone company—See STREETS.

Ohio courts—Jurisdiction over wrongful killing in another state—See WRONGFUL DEATH.

Common pleas has jurisdiction to vacate assignment for creditors—Probate has not—See ASSIGNMENTS FOR CREDITORS.

Decennial board of equalization—Acts under Sec. 2814, Rev. Stat.—Board may exercise discretion—Duty of auditor to transmit returns—See BOARD OF EQUALIZATION.

Interest to be excluded from amount of judgment under Sec. 6710, Rev. Stat., in ascertaining jurisdiction—See JUDGMENTS.

Action involving equitable relief, including injunction against disposal of family relics, etc.—Injunction to restrain action at law before justice of the peace—See ACTION OR SUIT.

Of common pleas judges at chambers—See INJUNCTION.

JURY—

Court requested by each party to instruct jury to render verdict in its favor thereby clothed with functions of jury—Verdict in such case—See TRIAL.

Subdivision 7, Sec. 5190, Rev. Stat., requires trial judge to give general instructions to jury after argument—See CHARGE TO JURY.

Suit to foreclose lien on stock of corporation—Neither party entitled to trial by jury—See TRIAL.

Purpose of Sec. 5201, Rev. Stat., relating to special findings—See VERDICTS.

JUSTICES OF THE PEACE—

Action before which involves equitable relief, including injunction against disposal of family relics—May be restrained by injunction—See ACTION OR SUIT.

Landlord and Tenant—Liens.

LANDLORD AND TENANT—

*Action by farm owner against telegraph company for cutting trees along highway—Oral license, not authorized by landlord, from tenant, acted upon in good faith by company—Will defeat or mitigate recovery of exemplary damages though not compensation—*In an action against a telegraph company by the owner of a farm for the wrongful cutting of shade trees growing along a highway which passes through it, an oral license from a tenant not authorized to give it, if acted upon in good faith, and the instructions of the company to its servants with respect to the manner of trimming trees along its line, if given in good faith, are competent to defeat or mitigate the recovery of exemplary damages, though not competent to prevent the recovery of exemplary damages though not competent to prevent the recovery of full compensation. *Western Union Tel. Co. v. Smith*, 106.

Rents of land accruing after assignee has taken possession belong to mortgagee if required to satisfy his claim—See ASSIGNMENTS FOR CREDITORS.

LEGACIES—

Though not specifically charged upon real estate so held, when—See WILLS.

LEGAL TITLE—

Controls descent of real property—See DESCENT AND DISTRIBUTION.

LEGISLATIVE POWER—See POWERS.

LICENSES—

Action by farm owner against telegraph company for cutting trees along highway—Oral license not authorized by landlord—Defeats or mitigate recovery of exemplary damages—Though not compensation—See LANDLORD AND TENANT.

Contract for use of patent right that licensee shall pay double former fee for use of patent after expiration of time—Not unlawful—Liquidated damages—See CONTRACTS.

LIENS—

Suit to foreclose lien on stock of a corporation—Neither party entitled to trial by jury—See TRIAL.

Railroad mortgages and liens—After acquired property—See MORTGAGES.

Mortgage of real property not delivered to recorder prior to appointment of receiver not a valid lien against him—See RECEIVERS.

Liens—Lotteries.

Of legacies upon real estate though not so charged—See WILLS.

LIMITATION OF ACTIONS—

*Time of commencing action—Sections 4983 and 4991, Rev. Stat.—Suit for false imprisonment brought in United States circuit court—Against two corporations, one resident of New York and one of Ohio—Proceeding held to be commencement of action—A party brought, within proper time, suit for false imprisonment in the United States circuit court for the southern district of Ohio against two corporations, one a resident of the state of New York and the other a resident of Ohio. The Ohio corporation answered to the merits. The New York corporation demurred to the petition for that the same did not state facts sufficient to constitute a cause of action, which was sustained and judgment given for that company against the plaintiff. The Ohio corporation then, by amended answer, pleaded that the court was without jurisdiction for the reason that there is no controversy between the citizens of different states. The cause was then heard on the motion of defendant to dismiss, which was sustained and the cause dismissed on the ground that the court had no jurisdiction over the parties or subject matter. Held: That the proceeding was the commencement of an action, within the meaning of Section 4991, Revised Statutes; that the plaintiff failed otherwise than upon the merits, and is entitled to commence a new action within one year from such date although, under Section 4983, Revised Statutes, his action would be barred. *Railway Co. v. Bains*, 26.*

LIQUIDATED DAMAGES—

Contract for use of patent right that in case of use after expiration of term without license, licensee shall pay double former rate—See CONTRACTS.

LOAN ASSOCIATIONS—See BUILDING AND LOAN ASSOCIATIONS.

LOCAL DRAINAGE—

Local drainage defined—See DITCHES AND DRAINS.

LOTTERIES—

1. *Contracts of investment security—Debentures or certificates—Redemption—Unequal advantage—Unlawful, when—*Contracts of investment security, debentures or certificates, which by the device of a "numeral-apart," may be called in and redeemed at any period before they would regularly ac-

 Lotteries—Mechanic's Lien.

LOTTERIES—(Continued.)

accumulate a credit in the reserve fund equal to the stipulated endowment value, and otherwise giving unequal advantages to the certificate holders, contain the elements of chance and prize constituting a lottery, and are unlawful. *State v. Investment Co.*, 283.

2. *Accumulation of reserve fund by lapses unlawful, when—* Contracts of investment security, debentures or certificates, which cannot reasonably be expected to accumulate a reserve fund equal to the stipulated endowment values within the stated period, without aid from lapses or appropriation from premiums on new business, are fraudulent, contrary to public policy and unlawful. *Ib.*

MAYOR—

Removal of officers by—See **OFFICES AND OFFICERS**.

MANDAMUS—

The proper remedy in case of a misconstruction of a statute by a public officer is by mandamus to compel him to act in accordance with the required construction or show cause why he does not. Such fact does not warrant removal—See **OFFICES AND OFFICERS**.

Will not issue to compel state board of medical registration to recognize college nor to compel board to issue certificates to holders of diplomas—See **COLLEGES**.

In mandamus to compel deputy state supervisors of elections to print names of candidates upon official ballot, state supervisor is not a proper party—See **ELECTIONS**.

MASTER AND SERVANT—

Contributory negligence of railroad employe in stepping in front of engine—Rule as to care required—Law excusing passengers from keeping lookout not applicable to employees—See **NEGLIGENCE**.

MARRIED WOMAN—See HUSBAND AND WIFE.**MEDICAL COLLEGES—See COLLEGES.****MEDICAL REGISTRATION—See STATE BOARD OF MEDICAL REGISTRATION.****MECHANIC'S LIEN—**

Railroad mortgages and liens—After acquired property—See **MORTGAGES**.

Merchandise—Mortgages.

MERCHANDISE—

Traffic arrangements between city and interurban railways for carriage of, under Sec. 3443-11, Rev. Stat.—See STREET RAILWAYS.

See also SALES.

MINOR CHILDREN—See PARENT AND CHILD.

MINGLING FUNDS—See DESCENT AND DISTRIBUTION.

MISCONDUCT IN OFFICE—See OFFICES AND OFFICERS.

MISREPRESENTATION—

Sale of goods by sample—Failure to state cause of action for breach of contract of warranty—See SALES.

MORTGAGES—

1. *Railroad mortgages and liens covering after acquired property attaches, when—Mechanic's lien is subsequent to the lien of mortgage on after acquired property, when—Act of April 6, 1883—Section 3208, Rev. Stat.*—The lien of a mortgage on a railroad covering after-acquired property, attaches at the time of the acquisition of the property, subject to all rights against the property then existing; but the lien of a mechanic's lien for labor and materials used in making improvements on real estate after the title to such real estate was acquired by the mortgagor, is subsequent to the lien of such a mortgage on after-acquired property, when such mortgage was executed before the passage of the act passed April 6, 1883, now Section 3208 of the Revised Statutes, and before the acquisition of the property, and was recorded before such materials and labor were furnished. *Reed v. Ginsburg*, 11.
2. *Land mortgaged by life devisee in fee simple—Foreclosure and order of sale—Sheriff's deed—Purchaser's possession for over forty years—Action by heirs of mortgagor—Sheriff's deed conveyed legal title*—A mortgage in fee simple of certain lands was made to secure an obligation of the mortgagor to the mortgagee; it was foreclosed and an order made for the sale of the land for the life of the mortgagor, and was so sold; on confirmation, a deed in fee simple was ordered to be made to the purchaser, and such deed was made to him by the sheriff; the purchaser went into possession under his deed, and he and his successors in title continued in the adverse possession of the property for over forty years when an action was commenced by the heirs of the mortgagor against the present occupant under the title derived

Mortgages—Motions and Orders.

MORTGAGES—(Continued.)

from the sheriff's deed, to recover the land. *Held*, That the sheriff's deed conveyed the legal title to the land, and the plaintiffs having at most but an equitable title, could not recover, without first obtaining a reformation of the deed. *Held further*, That the right of reformation of the deed accrued to the mortgagor upon its execution and was barred long before the commencement of the action by the heirs to recover the land. *Brockschmidt v. Archer et al.*, 502.

Mortgage of real property not delivered to recorder prior to appointment of receiver not a valid lien against receiver—*See RECEIVERS.*

Rule as to rights and liabilities of sureties on general and special bonds to proceeds of indemnity mortgage by defaulting guardian—*See PRINCIPAL AND SURETY.*

Filing answer by building association as mortgagee in action by assignee to sell land, not an election to forfeit stock which will estop association from claiming fines, etc.—*See ASSIGNMENTS FOR CREDITORS.*

Rents of land accruing after assignee has taken possession belong to mortgagee if required to satisfy his claim—*See ASSIGNMENTS FOR CREDITORS.*

Action before justice of the peace involving equitable defenses, the redemption of property mortgaged, etc., restrained by injunction—*See ACTION OR SUIT.*

MOTIONS AND ORDERS—

Judgments of common pleas court may be set aside by consent of parties without statement of grounds of such action—*See JUDGMENTS.*

Exercise of judicial function—Order or judgment to be progressively enforced—*See COURTS.*

Order appointing receiver for insolvent corporation embracing real estate; not invalid because petition and motion do not in terms refer to such property—*See RECEIVERS.*

Stipulation upon pleadings made up as to certain issues, that the law in one case shall control others and be conclusive as to all matters in cases not yet tried "except as to certain matters of fact upon which issue may be joined therein" does not preclude parties from raising other issues by proper pleadings on leave of court—*See JUDGMENTS.*

Order for vacation of judgment without adjudging valid defense is erroneous but not void—Sec. 5360, Rev. Stat.—*See JUDGMENTS.*

Municipal Corporations—Non-resident.

MUNICIPAL CORPORATIONS—

Status of as to streets—Compensation for use by telephone company sufficient to keep same in repair—See **STREETS**.

NEGOTIABLE INSTRUMENTS—See **BILLS AND NOTES**.

NEGLIGENCE—

1. *Railway liability for accident to passenger or employee—Passengers not held to duty required of employees, when*—The rule of law which excuses passengers from the obligation to observe a strict lookout for trains and locomotives when alighting from or getting upon trains over the tracks of a railway company, does not apply to employees whose duties may require them to cross the tracks in the yards or at the depots of the railway. *Wabash Railroad Co. v. Skiles*, 458.

2. *Care required of employees in passing over tracks*—Such employees will be held to the exercise of ordinary care in going from a place of safety upon or across railway tracks; and ordinary care requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a railroad track, should use them for the purpose of discovering and avoiding danger from an approaching train; and an omission to do so, without reasonable excuse therefor, is negligence which will defeat an action by such person to recover damages for an injury to which such negligence contributed. *Ib.*

3. *Stepping from platform upon railway track—Contributory negligence, when*—Where such an employee, without looking or listening, steps upon a railway track from a place of safety on a platform, immediately after the passing of a train, and in front of and close to, a backing switch engine, so that he is immediately struck and injured by such engine, he is guilty of contributory negligence, and cannot recover for the injury thus received. *Ib.*

Railroad station platform—Liability and duty of railway company incident to guarding and lighting—See **RAILROADS**.

Ohio courts—Jurisdiction over wrongful killing in another state—See **WRONGFUL DEATH**.

NEW TRIAL—

Judgment upon conceded facts may be reviewed without motion for a new trial—See **ERROR**.

NON-RESIDENT—See **ATTACHMENT**.

 Notice—Parent and Child.

NOTICE—

Purchaser of bonds issued under One Mile Pike Law required to take notice of limitations upon power of taxation—Loss falls upon him, when—See TAXATION.

NUL TIEL CORPORATION—

Requires to be specially pleaded—See CORPORATIONS.

OFFICES AND OFFICERS—

1. *Only damages for usurpation of office—Are emoluments or salary during time unlawfully held—*In an action to recover damages for the usurpation of an office, the only damages recoverable are the emoluments or salary pertaining to the office during the time it was unlawfully withheld from the rightful claimant. *Palmer v. Darby*, 520.
2. *Removal of public officer for specified causes—Facts must be stated—Right of officer to be heard—*When a public officer may be removed for specified causes, such facts must be stated as in judgment of law constitute the cause relied on and an opportunity afforded the officer to be heard, before he can be legally removed. *State ex rel. v. Hoglan et al.*, 532.
3. *Misconstruction of statute not evidence of incompetency—*The misconstruction of a statute, about which there may be an honest difference of opinion, is not such evidence of incompetency, or misconduct, in the officer as to warrant his removal on either of these grounds. *Ib.*
4. *Proceedings in mandamus should be employed—Civil service commissioners—Removal by mayor—*The proper remedy in such case is a proceeding in mandamus to compel him to act in accordance with the required construction or to show cause why he does not. *Ib.*

Sureties liable where officer, under color of office, uses more force than necessary in making arrest—See BONDS.

ONE MILE PIKE LAW—

Section 4812, Rev. Stat., 83 O. L., 85, is retroactive and unconstitutional as to pikes already constructed—See TAXATION.

ORDERS—See MOTIONS AND ORDERS.

ORDINARY CARE—See NEGLIGENCE.

OUTLET DITCHES—See DITCHES AND DRAINS.

PARENT AND CHILD—

*Children under fifteen entitled to allowance from estate of mother as from father—*Children under fifteen years of age, are entitled to have set off and allowed to them out of the

Parent and Child—Personal Property.

estate of their deceased mother, sufficient provisions or other property, or money, to support them for twelve months, in like manner as they are entitled to such support out of the estate of their deceased father. *In re Est. Hinton*, 485.

PARK COMMISSION—See CLEVELAND PARK COMMISSION.

PARTIES—

Plaintiff in error—Joined as defendant in error—Resorts to cross-petition—Must file brief, when—Supreme Court practice—See ERROR.

Deputy state supervisors of elections not a board or body corporate; act separately and suit should be against them in that capacity; one may prosecute error though others refuse to join—See ELECTIONS.

In mandamus to compel deputy state supervisor of elections to print names of candidates upon official ballots, state supervisor not a proper party—See ELECTIONS.

In action by corporation it is not necessary to aver that it is a corporation; such averments surplusage and impose no burden of proof—See CORPORATIONS.

To raise issue of *nul tiel* corporation, defendant must specially plead—See CORPORATIONS.

PATENT RIGHTS—

Contract for use of patent right that in case of after expiration of term licensee shall pay double the former rate not unlawful or against public policy, but is in the nature of liquidated damages and may be recovered on breach of agreement—See CONTRACTS.

PERSONAL INJURIES—See NEGLIGENCE.

PERSONAL PROPERTY—

In hands of assignee of corporation and being held and operated in the conduct of a going business—Subject to taxation—Assignee should list—See TAXATION.

Rule as to descent of real property, following legal title, does not apply to personal property—Sec. 4162, Rev. Stat.—Descent of estate by former husband and wife—Where personal property is mingled with common funds—See DESCENT AND DISTRIBUTION.

 Petition—Pleading.

PETITION—

Where charter, franchise or powers of a corporation are the foundation of an action, the same should be specially pleaded—In case of foreign corporations, the name of the state granting should appear—See CORPORATIONS.

In action by corporation need not aver that it is a corporation; averments surplussage and imposing no burden of proof—See CORPORATIONS.

PHYSICIANS AND SURGEONS—

Mandamus will not issue to compel state board of medical registration to recognize college or issue certificates on diplomas—See COLLEGES.

PLEADING—

1. *Breach of contract*—Action to recover purchase price of goods—*Averments*—A petition to recover the whole purchase price paid for goods, must show either that the goods were of no value, or that the plaintiff, within a reasonable time rescinded the contract and restored or offered to restore to the defendant all of the goods purchased, so that the defendant may be put in *statu quo*. *Crooks v. Eldridge & H. Co.*, 195.

2. *Plea of former recovery*—Not available as bar when court was without jurisdiction—A plea of former recovery on the demand in suit, is not available as a bar to the action, where the court was without jurisdiction to render the judgment—*Oil Well Supply Co. v. Koen*, 422.

3. *Conceded facts*—Conceded facts prevail over general allegations. *State ex rel. v. Lewis*, 216.

Claim of misrepresentation of goods by sample—Allegations—Failure to state cause of action for damages for breach of contract of warranty—See SALES.

Corporation suing need not aver that it is a corporation; such averments surplussage and impose no burden of proof—See CORPORATIONS.

To raise issue of *nul tiel* corporation defendant must specially plead—See CORPORATION.

Order appointing receiver for insolvent corporation embracing real estate; not invalid because petition and motion do not in terms refer to such property—See RECEIVERS.

When corporation is made defendant and its charter, powers or franchises become the foundation of the action, the same must be specially pleaded. In case of foreign corporation, name of state granting should appear—See CORPORATIONS.

Pleading—Powers.

Stipulation, upon pleadings made up as to certain issues, that the law in one case shall control others and be conclusive as to all matters in cases not yet tried "except as to certain matters of fact upon which issue may be joined therein," does not preclude parties from raising other issues by proper pleadings—See JUDGMENTS.

Filing of brief by plaintiff in error joined as defendant in error in cross-petition—See ERROR.

When public officer may be removed for specified causes, such facts must be stated as constitute cause relied on, and opportunity offered to be heard—See OFFICES AND OFFICERS.

Requirements in indictments of words "against the peace and dignity of the state of Ohio"—See INDICTMENTS.

Judgment upon conceded facts may be reviewed without motion of new trial.—See ERROR.

PLEAS IN BAR— See PLEADING.

PLEDGES—

Suit to foreclose lien upon stock of incorporated company and suit upon note—Merger—See JUDGMENTS.

Suit to foreclose lien on stock of corporation—Neither party entitled to trial by jury—See TRIAL.

Action before justice of the peace involving equitable defenses, the redemption of property pledges, etc., restrained by injunction—See ACTION OR SUIT.

POLICY HOLDERS—

Securities deposited with superintendent of insurance cannot be recovered by assignee of company without showing that company is no longer liable to policy holders—Distribution in such cases—See INSURANCE.

POWERS—

Power conferred on court of justice controls in fixing judicial character of power, when—See COURTS.

Distribution of powers of state—Operates as inhibition against imposition of power by one department upon another—See COURTS.

When charter, franchises, or powers of corporation are foundation of action, same should be specially pleaded. In case of foreign corporations, the name of the state granting should appear—See CORPORATIONS.

Legislature has no power to pass retroactive laws—See CONSTITUTIONAL LAW.

Practice—Principal and Surety.

PRACTICE—

Court requested by each party to instruct jury in its favor thereby clothed with functions of jury—Verdict in such case—See TRIAL.

Judgment upon conceded facts may be reviewed without motion for a new trial—See ERROR.

PRINCIPAL AND AGENT—

Suretyship without knowledge of makers of note—Made at request of agent of principal makers—See BILLS AND NOTES.

PRINCIPAL AND SURETY—

1. *Guardian gave general and special bonds—Secs. 6259 and 6285, Rev. Stat., also gave realty mortgage—Sureties on general bond insolvent—On special bond solvent—Rule as to credits from proceeds of sale—A guardian upon his appointment gave a general bond with three sureties under Section 6259, Revised Statutes, and afterwards gave a special bond with two sureties for the sale of real estate under Section 6285, and later died insolvent and a defaulter to his wards in a large sum received on the sale of real estate and from other sources, having commingled the funds and used them as his own; before his death he gave a mortgage on his real estate to his sureties on both bonds for their indemnity; after his death his administrator sold the real estate upon petition in the probate court to pay debts, and by order of that court paid the net proceeds to the wards, and they applied the whole of it upon the liability of the general bond, the sureties on that bond being insolvent, and the sureties on the special bond being good. In an action by each ward upon the special bond for his share thereof, the bond being largely in excess of the amount received on the sale of the real estate, the courts below held that the sureties on both bonds were cosureties for the amount of the guardian's default, and that each surety was entitled to have one-fifth of the amount realized under the mortgage, applied as a credit on his liability on the bond signed by him, and that sum being greater than the liability of the two sureties on the special bond, rendered judgment in favor of the two sureties and dismissed the petition: Held, that this was error; that the sureties on both bonds were cosureties only to the extent of the proceeds of the sale of the real estate; that the two sureties on the special bond were entitled to have the sum realized from the indemnity mortgage, credited upon their*

Principal and Surety—Probate Courts.

liability in proportion of the liability under the special bond for funds received on sale of real estate to the liability under the general bond for funds not so received. *Swisher v. McWhinney*, 343.

2. *Rule of calculation of interest upon amount realized from sale*—Interest should be calculated upon the amount realized by the guardian on the sale of the real estate with annual rests to the date of his death, and thereafter at simple interest without such rests to the rendition of the judgment. *Ib.*

3. *Distributive share to wards from realty sale*—Where the wards own the real estate in equal shares, the money realized from the special bond given on the sale of such real estate, should be equally divided among them, even though the amount due to the several wards by reason of other funds received by the guardian, may be unequal. *Ib.*

Party signing note so as to indicate *prima facie* that he was original promisor may show that he was guarantor or surety, when—See **BILLS AND NOTES**.

Surety on undertaking in replevin have no remedy at law or in equity upon contract of indemnity until loss occurs; nor has defendant, though sureties and judgment debtors are insolvent and the judgment is otherwise uncollectible—See **SPECIFIC PERFORMANCE**.

Liability on bond of officer where under color of office he uses unnecessary force in making arrest—See **BONDS**.

PRIORITIES—See **RECEIVERS**.

PRIZES—See **LOTTERIES**.

PROBATE COURTS—

Probate court has complete jurisdiction to direct mode of use of streets by telephone company under Sec. 3461, Rev. Stat.—See **STREETS**.

Power conferred on probate courts to direct use of streets by telephone company by Sec. 3461, Rev. Stat., not unconstitutional—See **STREETS**.

Construction of telephone lines under Secs. 3454, 3461-1 and 3471, Rev. Stat., under order of probate court—See **STREETS**.

Common pleas has jurisdiction to vacate assignment for creditors—Probate has not—See **ASSIGNMENTS FOR CREDITORS**.

County ditches—Sec. 4510-3, Rev. Stat.—Error will not lie to action of probate appointing freeholders, when—See **DITCHES AND DRAINS**.

Promissory Notes—Railroad Yards.

PROMISSORY NOTES—See **BILLS AND NOTES.**

PUBLIC OFFICERS— See **OFFICER AND OFFICERS.**

PUBLIC PARKS—See **CLEVELAND PARK COMMISSION.**

PUBLIC POLICY—

Contracts containing elements of chance—Unlawful—Against public policy—See **LOTTERIES.**

PUBLICATION—

No valid judgment *in personam* can be rendered against nonresident in attachment who has not appeared nor been summoned notwithstanding service by publication—See **ATTACHMENT.**

RAILROADS—

Railroad station platform—Liability and duty of railway company incident to guarding and lighting platform—A railway company having constructed its station and a platform incident thereto does not, by permitting persons to use such platform for purposes of their own not connected with the transaction of business at such station, become charged with a duty to reconstruct guard or light such platform so as to render it safe for the permitted use. (P., F. W. & C. R. Co. et al. v. Bingham, 29 Ohio St., 364, approved and followed; Harriman v. Ry. Co., 45 Ohio St., 11, distinguished.) Railway Co. v. Allen, 183.

Mortgages and liens—After acquired property—Sec. 3208, Rev. Stat.—See **MORTGAGES.**

Ohio courts—Jurisdiction over wrongful killing in another state—See **WRONGFUL DEATH.**

Degree of care required of employes in going about railroad yards—See **NEGLIGENCE.**

See also **STREET RAILWAYS.**

RAILROAD EMPLOYES—

Contributory negligence in stepping in front of engine defeating recovery—Rule as to care required—Law excusing passengers from keeping lookout not applicable to employes—See **NEGLIGENCE.**

RAILROAD YARDS—

Degree of care required of employes in going about—See **NEGLIGENCE.**

Real Property—Recording.

REAL PROPERTY—

Order appointing receiver for insolvent corporation embracing real estate; not invalid because petition and motion do not in terms refer to such property—See RECEIVERS.

Decennial board of equalization—Acts under Sec. 2814, Rev. Stat., jurisdiction—Board may exercise discretion—Duty of auditor to transmit returns—See BOARD OF EQUALIZATION.

Rents of land accruing after assignee has taken possession belong to mortgagee if required to satisfy his claim—See ASSIGNMENTS FOR CREDITORS.

Legacies though not specifically charged upon so, held, when—See WILLS.

Descent controlled by legal title—See DESCENT AND DISTRIBUTION.

See also WILLS.

RECEIVERS—

1. *Receivers for insolvent corporation—Real estate—Order appointing embraces*—An order appointing a receiver for an insolvent corporation which in terms makes him "receiver for all the property and assets of the company, of every kind and description, wherever located," is sufficiently broad to embrace the real estate of the corporation, and is not invalid as respects such real estate because of the fact that the petition and motion in the case in which the order is made do not in terms refer to real estate, but, allegations otherwise being sufficient, prays "that the court will appoint a receiver to take charge of all the property and assets of the company." *Cheney v. Cycle Co.*, 205.

2. *Mortgage not delivered to recorder before receivership not a lien, when—Distribution*—A mortgage of real property which has not been delivered to the recorder of the proper county for record before the appointment of a receiver for the property of the mortgagor, is not a valid lien upon the property as against the receiver, and the receiver, for and in the interest of general creditors, is entitled to the proceeds of sale of such mortgaged premises in preference to the mortgagee. *Ib.*

RECORDING—

Railroad mortgages and liens—After acquired property—See MORTGAGES.

Reformation of Instruments—Roads.

REFORMATION OF INSTRUMENTS—

Adverse possession under sheriff's deed—Right to reformation
—Action by heirs of mortgagor—See MORTGAGES.

RELIGIOUS INSTITUTIONS—

Person not of blood of testator designated heir under Sec. 4182, Rev. Stat., not issue of the body within Sec. 5915, Rev. Stat., and bequests to charitable, etc., institutions, not invalid on account of—See WILLS.

Exercise of judicial functions—Order or judgment to be progressively enforced—See COURTS.

REMOVAL FROM OFFICE—See OFFICES AND OFFICERS.**RENTS—**

Of land, accruing after assignee has taken possession, belong to mortgagee if required to pay his claim—See ASSIGNMENTS FOR CREDITORS.

REPLEVIN—

Sureties on bond in—Have no remedy on contract to indemnify until event occurs; nor has defendant, though sureties on replevin bond and judgment debtor are insolvent and judgment is otherwise uncollectible—See SPECIFIC PERFORMANCE.

RESERVE FUNDS—

Of investment security, debentures or certificates—Accumulation by lapses—Unlawful, when—See LOTTERIES.

RES JUDICATA—

Stipulation that law in one case shall control others "except as to certain matters of fact upon which issues may be joined herein" does not preclude parties from raising other issues—See JUDGMENTS.

Plea of former recovery not available as plea in bar where court was without jurisdiction—See PLEADING.

RETROACTIVE LAWS—

Statute imposing new or additional burden, duty, obligation or liability as to past transactions is repugnant to Sec. 23, Art. 2, of the constitution—See CONSTITUTIONAL LAW.

ROADS—See HIGHWAYS.

SALES—

1. *Claim of misrepresentation of goods by sample—Allegations necessary—Instructions to jury—Measure of recovery—*A petition in which the plaintiff alleges that he paid to the defendant a certain sum for goods, and also a certain other sum for freight and other expenses connected with the sale and delivery of the goods; and that the goods when delivered to the plaintiff were not as represented and did not correspond to the sample by which the plaintiff was induced to purchase, and also that the goods were unmerchantable, unmarketable and unfit for use, and praying for the recovery of the entire consideration paid and also the money paid in connection with the sale and delivery of the goods, does not state facts sufficient to constitute a cause of action for damages for breach of contract of sale with warranty; and an instruction to the jury that if they were satisfied, by a preponderance of the evidence, of the truth of the facts set forth in the petition, the amount of the plaintiff's recovery should be such amount as the evidence shows the plaintiff paid the defendant for the goods, and the expense incurred in connection therewith, not to exceed the amount claimed in the petition, less the value, if any, of the goods in the plaintiff's possession, is erroneous. *Crooks v. Eldridge & H. Co.*, 195.

Petition to recover purchase price paid for goods must show that goods were of no value or that contract was properly rescinded, so that defendant may be placed in *statu quo*—See PLEADING.

SECURITIES—

Deposited with superintendent of insurance cannot be recovered by assignee of company without first showing that company is no longer liable to policy holders—Distribution in such cases—See INSURANCE.

SECURITY COMPANIES—

Device containing elements of chance, constituting lottery—See LOTTERIES.

SERVICE—

No valid judgment *in personam* can be rendered against non-resident in attachment who has not been summoned or appeared notwithstanding service by publication—See ATTACHMENT.

Settlement—Specific Performance.

SETTLEMENT—

Action by stockholders of a building and loan association to set aside assignment for creditors—Settlement between association and assignee—Not a settlement against complaining stockholders unless they consent—See ASSIGNMENTS FOR CREDITORS.

SEWERS—See DITCHES AND DRAINS.

SHADE TREES—

Action by farm owner against telegraph company for cutting trees along highway—Oral license, not authorized by landlord—Defeats or mitigates exemplary damages, but not compensation—See LANDLORD AND TENANT.

SHELLEY'S CASE—

Construction of will made prior to abrogation of—See WILLS.

SHERIFF'S DEED—

Land mortgaged by life devisee in fee simple. Foreclosure and order of sale—Sheriff's deed—Purchaser's possession for over forty years—Action by heirs of mortgagor—Sheriff's deed conveyed legal title—See MORTGAGES.

SHERIFF'S SALES—See JUDICIAL SALES.

SPECIAL BONDS—

Rule as to rights and liabilities of sureties on general and special bonds as to proceeds of indemnity mortgaged by defaulting guardian—See PRINCIPAL AND SURETY.

SPECIAL FINDINGS—See VERDICTS.

SPECIAL PLEAS—

To raise issue of *null tiel* corporation, it must be specially pleaded—See CORPORATION.

SPECIFIC PERFORMANCE—

1. Court of equity cannot compel performance of covenant of indemnity—A court of equity cannot compel the performance of a covenant of indemnity, in advance of the happening of the event or contingency upon which, by its terms, it is to be performed. *Henderson-Achert Lith. Co. v. Skillito Co.*, 236.

 Specific Performance—Statutes.

2. *Sureties on undertaking in replevin—No remedy upon contract of indemnity until loss*—Sureties on an undertaking in replevin have no remedy at law or in equity upon a contract to indemnify them against loss on account of their suretyship, until such loss has occurred; nor has the defendant in the replevin suit who recovered a judgment against the plaintiff therein, though the sureties and judgment debtor be insolvent, and the judgment be otherwise uncollectible. *Ib.*

STATE BOARD OF MEDICAL REGISTRATION—

Mandamus will not issue board to recognize college or issue certificates on diplomas—See COLLEGES.

STATE SUPERVISOR OF ELECTIONS—

Decision of state supervisor final—See ELECTIONS.

STATION—

Railroad station platform—Liability and duty of railroad company incident to guarding and lighting—See RAILROADS.

STATU QUO—

Petition to recover purchase price of goods must show that goods were of no value or that contract was properly rescinded, so that defendant may be placed in *statu quo*—See PLEADING.

STATUTES—

Rule as to rights and liabilities of sureties on general and special bonds under Sec. 6259 and Sec. 6285, Rev. Stat., as to proceeds of indemnity mortgage by defaulting guardian—See PRINCIPAL AND SURETY.

Telephone companies may construct lines along streets and highways under Secs. 3454, 3461-1 and 3471, Rev. Stat., under order of probate—See STREETS.

Exemption from sewer assessments under Sec. 2380, Rev. Stat.—Applicable where—See DITCHES AND DRAINS.

Statutes imposing new or additional burden, duty, or obligation or liability as to past transactions is repugnant to Sec. 28, Art. 2 of the constitution—See CONSTITUTIONAL LAW.

Amendment to Section 4812, Rev. Stat., 83 O. L., 85, retroactive and void as to pikes already constructed—See TAXATION.

 Statutes.

STATUTES—(Continued.)

- Authority to enter omitted taxes on liquor business not restricted to current year—Act 94 O. L., 133—See TAXATION.
- Section 4162, Rev. Stat., mingling personal with common fund—See DESCENT AND DISTRIBUTION.
- Construction—Power conferred on court of justice controls in fixing judicial character of power, when—See COURTS.
- Right by statute of other state, territory or country enforced in Ohio, section 6134a.—See WRONGFUL DEATH.
- Railroad mortgages and liens—After acquired property—Sec. 3208, Rev. Stat.—See MORTGAGES.
- Ohio courts—Jurisdiction over wrongful killing in another state—See WRONGFUL DEATH.
- Statutes of other states—*In pari materia*—Construction—Wrongful killing—See WRONGFUL DEATH.
- Section 5555, Rev. Stat., that "if there be not enough" (of the attached property) "to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue, in all respects as in other cases" cannot be applied where defendant is nonresident and no jurisdiction obtained except by publication—See ATTACHMENT.
- Judgments in attachment against nonresidents not served except by publication for amount beyond property attached acquire no additional force from Sec. 5355, Rev. Stat., authorizing party to have judgment opened up or from failure to pursue that remedy—See ATTACHMENT.
- Subdivision 7, Sec. 5190, Rev. Stat., requires trial judge to give general instructions to jury after argument—See CHARGE TO JURY.
- Person not of blood of testator designated heir under Sec. 4182, Rev. Stat., not issue of the body within Sec. 5915, Rev. Stat.—See WILLS.
- Order vacating judgment without adjudging that there is valid defense erroneous but not void—Sec. 5360, Rev. Stat.—See JUDGMENTS.
- Commencement of action—Failure otherwise than upon merits—Secs. 4983 and 4991, Rev. Stat.—See LIMITATION OF ACTIONS.
- Sections 4814 and 4815, Rev. Stat., not applicable, when—See TAXATION.
- Purpose of Sec. 5201, Rev. Stat., relating to special findings—See VERDICTS.
- Interest to be excluded from amount of judgment, under Sec. 670, Rev. Stat., in ascertaining jurisdiction—See JUDGMENT.

Statutes—Streets.

City and interurban railways may enter into traffic arrangements, under Sec. 3443-11, Rev. Stat., for carriage of freight
See STREET RAILWAYS.

Indictment for burglary under Sec. 6835, Rev. Stat., as amended 82 O. L., 161—See BURGLARY.

Mode of conducting trial, charge to jury, nature of charge, under section 5190—See CHARGE TO JURY.

Section 5201, general or special verdict and what a general verdict—See CHARGE TO JURY.

Decennial board of equalization—Acts under Sec. 2814, Rev. Stat.—Jurisdiction—Board may exercise discretion—Duty of auditor to transmit returns—See BOARD OF EQUALIZATION.

Section 4510-3, Rev. Stat., amount to be paid by lower county—County ditches—Error will not lie to action of probate appointing freeholders, when—See DITCHES AND DRAINS.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STIPULATION—

Upon pleadings made up as to certain issues, that the law in one case shall control others and be conclusive as to all matters in cases not yet tried "except as to certain matters of fact upon which issue may be joined therein," does not preclude parties from raising other issues by proper pleadings—See JUDGMENTS.

STOCKHOLDERS—

Action by stockholders of a building and loan association to set aside assignment for creditors—Settlement between association and assignee—Not a settlement against complaining stockholders under their consent—See ASSIGNMENTS FOR CREDITORS.

STREETS—

1. *Status of municipal corporation as to streets—compensation to keep in repair*—A municipal corporation, though holding the title to its streets, has no private proprietary interest in them which entitles it to compensation when they are subjected to an authorized additional public burden, by the construction of a telephone line therein. But being charged with the duty of keeping the streets under its control in repair, it may be allowed compensation to an amount sufficient to make the repairs rendered necessary by such additional use. It is not essential that provision be made for

 Street Railways—Superintendent of Insurance.

STREETS—(Continued.)

the assessment of such compensation by a jury. *Zanesville v. Telephone and Telegraph Co.*, 67.

2. *Sections 3454, 3461-1 and 3471, Rev. Stat.—Construction of telephone lines by order of probate court*—Telephone companies organized under the laws of this state, have the right, by virtue of Sections 3454, 3461-1, and 3471, of the Revised Statutes, to construct their lines along the streets and public ways of municipal corporations, in accordance with the order of the probate court made in pursuance of Section 3461, directing in what mode the lines shall be so constructed, when the municipal authorities and the company fail to agree, or the former unreasonable delay to enter into an agreement with the company. *Ib.*

3. *Power conferred by Sec. 3461, Rev. Stat., not unconstitutional*—The power to make such order, as provided in Section 3461, is not inappropriately conferred on the probate court; and that court has complete jurisdiction of a proceeding instituted therein in conformity with that section. The provision is not obnoxious to the constitution of the state on the ground that the power it confers is distinctively legislative or administrative, but is constitutional and valid. *Ib.*

Traffic arrangements between city and interurban railways, under Sec. 3443-11, Rev. Stat., for carriage of merchandise upon city streets—See **STREET RAILWAYS**.

STREET RAILWAYS—

Electric railway company in city and interurban electric railway company—May enter into valid arrangement to carry merchandise—Section 3443-11, Rev. Stat.—An electric railway company owning and operating a road upon a street of a city and an interurban electric railway company may, by favor of the provisions of Section 3443-11 of the Revised Statutes, enter into a valid traffic arrangement for the carriage of merchandise for hire upon said street. *State v. Traction Co.*, 272.

SUIT—

Proceedings in—See **ACTION OR SUIT**.

SUPERINTENDENT OF INSURANCE—

Official duty when insurance company becomes insolvent—
Distribution of funds deposited to policy holders—Balance to assignee—See **INSURANCE**.

 Superintendent of Insurance—Taxation

Securities deposited with assignee of company cannot recover without showing that company is no longer liable to any of its policy holders—See **INSURANCE**.

SUPERVISORS OF ELECTIONS—See **ELECTIONS**.

SUPREME COURT PRACTICE—See **ERROR**.

SURETIES—

Liability where officer, under color of office, uses unnecessary force in making arrest—See **BONDS**.

One who is ostensibly joint maker of note shown to be but guarantor—Makers not released from liability to indemnify because suretyship or guaranty was made without their knowledge—See **BILLS AND NOTES**.

Party signing note so as to indicate *prima facie* that he was original promisor may show that he was guarantor or surety, when—See **BILLS AND NOTES**.

See also **PRINCIPAL AND SURETY**.

SURPLUSAGE—See **PLEADING**.

TAXATION—

1. *Personal property in hands of assignee for creditors—Of manufacturing corporation—Being held and operated as before by corporation itself—Is subject to taxation and should be listed by assignee—Personal property in the possession of an assignee for the benefit of creditors of a manufacturing corporation, which is not being reduced to money for distribution among the creditors of the corporation, but is being held and operated, under the orders of the insolvency court, and at the joint request of the creditors of the assignee, in the conduct of a going business, such business being conducted as it had been theretofore by the corporation itself, is subject to taxation, and it is the duty of the assignee to list such property for taxation. French, Tr., v. Bode, Assignee, 323.*
2. *Authority of county auditor to enter omitted taxes on liquor business—Not restricted to current year—Act 94 O. L., 133—Dow law—The authority of the county auditor to enter upon the duplicate omitted taxes on the business of trafficking in intoxicating liquors is not restricted to those of the current year. Except as otherwise provided by the amendatory act of April 12, 1900 (94 O. L., 133), such taxes*

Taxation—Telephone and Telegraph Companies.

TAXATION—(Continued.)

omitted in previous years may be entered on the duplicate of the current year, and collected as other taxes. *Markle v. Newton, Treas.*, 493.

3. *Retroactive laws—Statute imposing new burdens as to past transactions unconstitutional*—A statute which imposes a new or additional burden, duty, obligation, or liability, as to past transactions, is retroactive, and in conflict with that part of Section 28, Article 2 of the constitution, which provides that, "The general assembly shall have no power to pass retroactive laws." *Miller v. Hizon, Treas.*, 39.

4. *Eighty-three O. L., 85, amending Sec. 4812, Rev. Stat., retroactive and invalid*—The amendment of Section 4812, Revised Statutes, 83 O. L., 85, passed April 17, 1886, adding five years to the period for which extra taxes might be levied under the One Mile Pike Law, is retroactive and void as to such pikes as had been constructed before the passage of that amendment. *Ib.*

5. *Sections 4814 and 4815, Rev. Stat., not applicable to pikes in special taxing districts, when*—Sections 4814 and 4815, Revised Statutes, are not applicable to pikes constructed in special taxing districts where the extra tax for such pike is required to be levied alike on the valuation of both real and personal property within the district. *Ib.*

6. *Purchaser of bonds under One Mile Pike Law must take notice of limitations, when—Mistake by purchaser falls upon him*—A purchaser of bonds, issued under the One Mile Pike Law, is bound to take notice of the limitations upon the power of taxation, the extent of the special taxing district, and of the valuation of the property therein; and if he makes a mistake, the loss must fall upon him, rather than upon the property owners in such special district. *Ib.*

Decennial board of equalization—Acts under Sec. 2814, Rev. Stat.—Jurisdiction—Board may exercise discretion—Duty of auditor to transmit returns—See BOARD OF EQUALIZATION.
Action to enjoin levy or collection can only be maintained by taxpayer—See ACTION OR SUIT.

TELEPHONE AND TELEGRAPH COMPANIES—

Action by farm owner against telegraph company for cutting trees along highway—Oral license not authorized by landlord—Defeats or mitigates exemplary damages, but not compensation—See LANDLORD AND TENANT.

Under Secs. 3454, 3461-1, and 3471, Rev. Stat., have the right to construct lines along streets and public ways, in accord-

Telephone and Telegraph Companies—Trusts.

ance with order of probate court under Sec. 3461—See **STREETS**.

Statutes of municipal corporation as to streets—Compensation sufficient to keep same in repair—See **STREETS**.

TITLE—

Sheriff's deed conveying legal title—Action to recover land by heirs of mortgagor—Adverse possession—See **MORTGAGES**.

TRAFFIC—See **STREET RAILWAYS**.

TREES—

Action by farm owner against telegraph company for cutting trees along highway—Oral license not authorized by landlord—Defeats or mitigates recovery of exemplary damages but not compensation—See **LANDLORD AND TENANT**.

TRIAL—

Court requested by each party to instruct jury in its favor thereby clothed with functions of jury—Verdict in each case—Where, at the conclusion of the evidence in a case, each party requests the court to instruct the jury to render a verdict in his favor, the parties thereby clothe the court with the functions of a jury, and where the party whose request is denied, does not thereupon request to go to the jury upon the facts, the verdict so rendered should not be set aside by a reviewing court, unless clearly against the weight of the evidence. First Natl. Bank v. Hayes, 100.

Proceeding in court comprehends complaint, process and inquiry according to established rules—See **COURTS**.

Section 5190, Rev. Stat., subdivision 7, requires general instructions to jury after arguments—See **CHARGE TO JURY**.

General or special verdict, submission of questions to test findings—See **VERDICT**.

TRUSTS—

Trust or absolute deed may be shown by parol, when—A trust engrafted on an absolute deed may be shown by parol evidence; but the declaration of such trust must be contemporaneous with the deed, and the evidence beyond a reasonable doubt as to the existence of the trust, and must be clear, certain, and conclusive as to its terms and conditions. Russell v. Bruer, 1.

United States Courts—Wife's Separate Estate.

TRUSTS—(Continued.)

Fund impressed with trust that it shall descend according to Sec. 4162, Rev. Stat.—See DESCENT AND DISTRIBUTION.

UNITED STATES COURTS—

Commencement of action—Failure otherwise than upon merits—Secs. 4983 and 4991, Ohio Rev. Stat.—See LIMITATION OF ACTIONS.

VACATION OF JUDGMENTS—

Order made without adjudging that there is valid defense erroneous but not void—Sec. 5360, Rev. Stat.—See JUDGMENTS.

VERDICT—

*General or special verdict—Submission of questions to test findings—Trial—*The purpose of Section 5201 of the Revised Statutes is to elicit from the jury such special findings of fact as will test the correctness of the general verdict, if a general verdict is returned; and it requires the court, upon request, to direct answers to be returned to such questions, stated in writing, as will elicit from the jury a finding of any fact whose legal effect may be, when considered with other facts admitted or to be found, to show whether or not the general verdict results from an erroneous application of the law; but it does not require the submission to the jury of questions whose purpose is only to ascertain the mental processes by which the jury may arrive at conclusions of fact. *Railway Co. v. Hawkins*, 391.

Court requested by each party to instruct jury in its favor thereby clothed with functions of jury—Verdict in such case—See TRIAL.

WARRANT—

Sureties on bond of officer acting with unnecessary force in making arrest, with or without warrant liable—See BONDS.

WARRANTY—

Claim of misrepresentation of goods by sample—Failure to state cause for damages for breach of contracts of warranty—See SALES.

WIFE'S SEPARATE ESTATE—See HUSBAND AND WIFE.

Wills—Wrongful Death.

WILLS—

1. *Devise of lands to son for life and at his death to heirs before abrogation of rule in Shelley's case*—Before the rule in Shelley's case was, as to wills, abrogated in this state by the statute of 1840, a testator devised certain lands to his son for life, and at his death to go to his heirs, and, there being nothing else in the will to show that the testator used the word "heirs" to designate a more limited class—as children: *Held*, That, as the lands passed under the will precisely as they would have descended at law, the son took an estate in fee simple in the lands so devised. *Brockschmidt v. Archer et al.*, 502.
2. *Legacies not specifically charged upon realty become a lien thereon, when*—Legacies not specifically charged upon real estate will, nevertheless, be held to be charged upon such real estate, and be a lien thereon, where it appears that the testator, at the time the will was made and at his decease, had no moneys or personal estate of any kind out of which such legacies could be paid, unless a contrary intention is manifest from the whole will. *Theobald v. Fugman*, 473.
3. *Heir at law, how designated*—*Sec. 4482, Rev. Stat.*—Charitable bequests within one year of testator's death not invalid, when—One, not of the blood of the testator, who has been designated an heir under favor of Section 4182, Revised Statutes, is not issue of the body of such testator within the meaning of Section 5915, Revised Statutes. Hence bequests in the will to benevolent, religious, educational or charitable purposes, are not rendered invalid, as respects such heir, by reason of the fact that the will was executed within one year of the decease of the testator. *Ib.*

WRIT AND PROCESS—

No valid judgment *in personam* can be rendered against non-resident in attachment who has not appeared or been summoned notwithstanding service by publication—See ATTACHMENT.

WRONGFUL DEATH—

1. *Ohio courts—Jurisdiction over wrongful killing in another state*—In order to give the courts of Ohio jurisdiction to adjudge a cause brought by an administrator of one who is alleged to have been in the employ of a railroad corporation and killed by its negligence in another state, it must, by force of Section 6134a, Revised Statutes, be shown that such

Wrongful Death.

WRONGFUL DEATH—(Continued.)

state allows the enforcement in its courts of the statute of this state of like character. It is not sufficient to show merely that the courts of that state entertain actions to recover for wrongful killing in another state. *Railway Co. v. Fox, Admr.*, 133.

2. *Rule of evidence*—*Sec. 6134a, Rev. Stat.*—Where an act of the legislature of a sister state gives the personal representative of one who has been killed by the wrongful act of another a cause of action to recover in all cases in which the deceased could have maintained an action had he lived, and a subsequent act by its provisions regulates the liability of corporations other than municipal for personal injuries to persons employed by them fixes the rules of evidence which shall govern in such cases, and provides that the decisions or statutes of other states shall not be pleaded or proven as a defense, both acts are to be treated as *in pari materia* in determining whether, under Section 6134a, Ohio Revised Statutes, the laws of such sister state allow the enforcement in its courts of the statute of Ohio of like character. *Ib.*
3. *Enforcement of laws of another state*—The enforcement by the courts of such sister state of the acts relating to the liability of corporations for injuries received by employes of such corporations through their negligence, mentioned in the last preceding paragraph, is not the equivalent of the enforcement of the statute of this state of like character. *Ib.*
4. *No jurisdiction in Ohio over acts of negligence in Indiana*—The courts of Ohio have not jurisdiction to hear and determine a suit brought by the administrator of an employe of a railroad company to recover for the wrongful death occurring from the negligence of the company in Indiana. *Ib.*

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